530 (Endorsed:) 5153. U. S. Circuit Court, District of Colorado. The United States vs. Fred Light. Report of testimony before Clifford G. Rowe, special examiner, behalf respondents. Opened, published and filed Dec. 29, 1908. Charles W. Bishop, clerk.

Forty-first Day, November Term, Tuesday, December 29th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

In Chancery. 5153.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

This cause coming on now to be heard on final hearing on *on* the bill of complaint, amendment to bill of complaint, demurrer, answer, supplemental answer, testimony and exhibits taken and filed herein, Ernest Knaebel, Esquire, appearing as solicitor for the complainant, and Ethelbert Ward, Esquire, and Ralph W. Mc-
531 Crillis, Esquire appearing as solicitors for the respondent, is argued by counsel to the hour of adjournment.

And thereupon, it is ordered by the court that further hearing herein be, and the same is hereby, continued until the incoming of the court on the thirty-first instant.

Forty-third Day, November Term, Thursday, December 31st, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

In Chancery. 5153.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

This cause coming on to be further heard on final hearing on the bill of complaint, amendment to bill of complaint, demurrer, answer, suplemental answer, testimony and exhibits taken and filed herein, Ernest Knaebel, Esquire, appearing as solicitor for the complainant, and Etherbert Ward, Esquire, and Ralph W. McCrillis, Esquire, appearing as solicitors for the respondent, is argued by counsel, and by the court taken under advisement.

Saturday, January 2nd, A. D. 1909.

Before the Clerk:

In Chancery. 5153.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

At this day comes Ethelbert Ward, Esquire, a solicitor of this court and withdraws the appearance heretofore entered by
532 him herein as solicitor for an- on behalf of the respondent.

Forty-fifth Day, November Term, Tuesday, January 5th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

In Chancery. 5153.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

This cause came on to be further heard at this term upon the bill and answer last amended, the replication and the proofs, and was argued by counsel, and thereupon, upon consideration thereof, the court being now fully advised in the premises;

Doth order, adjudge, and decree that the defendant, Fred Light, and all and singular his attorneys, agents, servants, and employés, and all persons whomsoever, acting by, through, or under him, be, and they hereby are, forever and perpetually enjoined from driving or conducting or causing or permitting to be driven or conducted, any cattle, horses, or other live stock now or hereafter belonging to said defendant or subject to his control, into or upon the Holy Cross Forest, or any portion thereof, and from in any manner causing, suffering, permitting or allowing any such live stock cattle, or horses to go, stray, or remain upon or within the said forest or any portion thereof.

And it is further ordered, adjudged, and decreed that the plaintiff have and recover of and from the defendant its costs herein, including the reasonable expense of the taking down by
533 stenographer and typewriting of the testimony taken in behalf of the plaintiff in this cause, to be ascertained and taxed; and that the plaintiff have execution therefor.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for the District of Colorado.

In Equity. No. 5153.

UNITED STATES OF AMERICA, Complainant,
vs.
FRED LIGHT, Defendant.

Petition on Appeal.

To the Honorable Robert E. Lewis, District Judge:

The above named defendant in the above entitled cause, conceiving himself aggrieved by the order and decree made and entered by the above named court in the above entitled cause, under date of January 5th, 1909, wherein and whereby among other things it was and is ordered, adjudged, and decreed that the defendant Fred Light and all and singular his attorneys, agents, servants, and employés, and all persons whomsoever acting by, through or under him, be, and they hereby are, forever and perpetually enjoined from driving, or conducting, or causing or permitting to be driven or conducted, any cattle, horses, or other live stock, now or hereafter belonging to said defendant or subject to his control, into or upon the Holy Cross Forest Reserve, or any portion thereof, and from in any manner causing, suffering, permitting or allowing
534 any such live stock, cattle, or horses to go, stray or remain upon or within the said Forest, or any portion thereof, and that the plaintiff have and recover from the defendant its costs in said cause, including the reasonable expense of a stenographer in taking down and typewriting the testimony of the plaintiff herein, and that plaintiff have execution therefor, does hereby appeal to the United States Supreme Court from said order and decree, and particularly from that part thereof which perpetually enjoins the defendant from causing or permitting his live stock to go or remain upon the Holy Cross Forest —, for the reasons set forth in the assignment of errors, which is filed herewith; and he prays that this, his petition for his said appeal, may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree was made, duly authenticated, may be sent to the United States supreme court.

Dated August 30, 1909.

R. W. McCRILLIS,
JOHN T. BARNETT,
JAMES H. TELLER,
Attorneys for Defendant.

(Endorsed:) No. 5153. In Equity. In the Circuit Court of the United States, district of Colorado. United States of America, Com-

plainant, versus Fred Light, Defendant. Petition on Appeal. Filed Aug. 31, 1909, Charles W. Bishop, Clerk. Thomas, Bryant & Malburn et al., Attorneys for defendant, 621-627 Ernest and Crammer Bldg., Denver, Colo.

535 Forty-eighth Day, May Term, Tuesday, August 31st, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fourth day of May, A. D. 1909.

In Chancery. 5153.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

This cause comes on now to be heard, Ralph W. McCrillis, Esquire, appearing as solicitor for the respondent. And thereupon, the respondent prays an appeal to the supreme court of the United States which is hereby allowed to it, but upon the condition, nevertheless, that the respondent give bond on such appeal in the sum of five hundred dollars ($500).

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court in and for Said District.

No. 5153. In Equity.

UNITED STATES OF AMERICA, Complainant,
vs.
FRED LIGHT, Defendant.

Assignment of Errors.

Comes now the defendant and files the following assignment of errors and having prayed an appeal in the above entitled cause, says that there is manifest error in the record and proceedings herein, and that the circuit court erred in this:

1st. In overruling the demurrer interposed by the defend-
536 ant to the bill of complaint in said cause, and requiring the defendant to make answer thereunto.

2nd. In entering a final decree therein in favor of the complainant and against the defendant in accordance with the prayer of the complaint.

3rd. That the court erred in rendering said decree, because the defendant was thereby perpetually enjoined from causing, suffer-

ing, permitting or allowing his cattle, horses and livestock from going within or remaining upon the Holy Cross Forest Reserve, described in said complaint, in contravention of the regulations of the Department of Agriculture in said complaint recited, and relating thereto.

4th. Because the statute authorizing or purporting to authorize, said regulations, is in contravention of the Constitution of the United States.

5th. Because the court in and by said decree determined the complainant to be exempt from the municipal laws of the state of Colorado concerning fences, and the maintenance thereof, being an act entitled "An Act concerning fences and repealing Chapter XXXIX of The General Statutes of the state of Colorado, entitled 'Fences,'" approved April 10th, 1885.

6th. Because the various acts of Congress and proclama-
537 tions of the President of the United States alleged and relied upon in the bill of complaint, whereby the said Holy Cross Forest Reserve was created, are unconstitutional exercises of power by the Congress and by the President of the United States acting thereunder, and being in excess of said powers are unconstitutional and void.

7th. Because said court by said decree recognized the validity of and enforced said rules and regulations of the Secretary of Agriture, recited in said complaint; that the exercise of said power by the Secretary of Agriculture consists of an unlawful and unconstitutional delegation of authority to him in consequence whereof said rules and regulations are void and of no effect.

8th. Because the said court in and by said decree determined and decided that the Congress and the President of the United States possessed constitutional power and right to organize the public domain within the state of Colorado into reservations and to operate the same and utilize the resources thereof as a source of profit to the United States.

9th. Because the said rules and regulations mentioned in said bill of complaint are unreasonable, do not insure or tend to insure the objects of forest reservation, and constitute an unconstitutional, unlawful and unwarranted interference by the Government of the United States with the fence and other statutes of the state of Colorado, enacted through the constitutional exercise of the
538 police power of said state, the contrary thereof being determined by said court in said decree.

10th. Because the consent of the state of Colorado to the establishment by Congress, or by the President of the United States, acting under its authority, of the said Holy Cross Forest Reserve, is constitutionally essential to the validity thereof; that without such consent the said reservation and the proclamation of the President creating the same is of no force or effect under the Constitution of the United States, but that the said decree determines the contrary.

11th. Because the rights asserted by the complainant in its bill of complaint are in violation of the terms of the act of Congress commonly called the "Enabling Act," whereby the state of Colorado

was permitted to adopt a constitution and be admitted into the Union upon an equality with the other states thereof, the contrary being determined by the said circuit court.

12th. Because the public lands of the United States are held in trust by the General Government for the people of the several states and the proclamation creating the said Holy Cross Forest Reserve without the consent of the people of Colorado thereto, duly expressed by an act of the General Assembly, is contrary to and in violation of the said trust and therefore of no effect.

13th. Because the said court was without jurisdiction to
539 hear and determine the said cause.

14th. The court further erred in not making, rendering, and entering a decree in favor of the defendant and against the complainant upon the record.

15th. And the court erred in other matters and things appearing upon the face of said record.

Wherefore, the said Fred Light, appellant, prays that the said decree in the circuit court of the United States, for the district of Colorado, in said cause, be wholly reversed and for naught held, and that the same be remanded with instructions to said circuit court to enter a decree therein for the defendant.

R. W. McCRILLIS,
JOHN T. BARNETT,
JAMES H. TELLER,
Attorneys for Defendant.

(Endorsed:) No. 5153. In Equity. In the circuit court of the United States, district of Colorado. United States of America, Complainant, versus Fred Light, Defendant. Assignment of Errors. Filed Aug. 31, 1909. Charles W. Bishop, clerk. Thomas Bryant & Malburn, et al., Attorneys for defendant, 621-627 Ernest and Cranmer Bldg., Denver, Colo.

540 American Bonding Company of Baltimore.

Home Office: Baltimore, Md.

Know all men by these presents, that we, Fred Light, as principal, and American Bonding Company of Baltimore, as surety are held and firmly bound unto United States of America, in the full and just sum of five hundred ($500.00) Dollars, to be paid to the said United States of America, its certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of September, A. D. 1909.

Whereas, lately at a term of the circuit court of the United States for the district of Colorado, sitting in Denver, in a suit pending in said court betwen Fred Light, complainant, and The United States of America, respondent, a decree was rendered against the said Fred

Light, complainant, and the said Fred Light, complainant, having obtained an appeal and filed a copy thereof in the clerk's office of the supreme court of United States to reverse the judgment in the aforesaid suit; and a citation directed to the said United States of America, citing and admonishing it to be and appear at the Supreme Court of United States at Washington, D. C., within thirty days from and after the date of said citation.

541 Now, the condition of the above obligation is such, that if the said Fred Light shall prosecute said appeal to effect, and answer all damages and costs, if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

FRED LIGHT,
By R. W. McCRILLIS, *His Solicitor.*
AMERICAN BONDING COMPANY
OF BALTIMORE,
By FRANK ENGLAND, *Vice-President.*

[Seal American Bonding Company of Baltimore, Incorporated.]

Attest:

G. E. WROE, *Ass't Secretary.*
FRANK ENGLAND.

Approved:
ROBT. E. LEWIS,
District Judge.

(Endorsed:) No. 5153. In the U. S. Circuit Court. In Equity. U. S. of America vs. Fred Light. Bond on Appeal to U. S. Supreme Court. Filed Sep. 13, 1909. Charles W. Bishop, Clerk. Ralph W. McCrillis, 443 Equitable Building, Denver, Colorado.

Friday, October 1st, A. D. 1909.

At Chambers, before the Honorable Robert E. Lewis, District Judge, the following proceedings were had:

In Chancery. 5153.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

This cause coming on now to be heard, and it appearing that the transcript of the record on appeal to the Supreme Court of the United States can not be completed within the return day of the citation herein;

It is ordered that the return day of the citation on appeal to the Supreme Court of the United States be, and the same is
542 hereby enlarged and extended for thirty (30) days.

Sixty-third day, May term, Monday, October 25th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fourth day of May, A. D. 1909.

In Chancery. 5153.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

This cause coming on now to be heard, and it appearing that the transcript of the record on appeal to the Supreme Court of the United States can not be completed within the return day of the citation herein;

It is ordered that the return day of the citation on appeal to the Supreme Court of the United States be, and the same is hereby enlarged and extended for fifteen (15) days.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the Eighth Judicial Circuit.

In Equity. No. 5153.

UNITED STATES OF AMERICA, Complainant,
543 vs.
FRED LIGHT, Defendant.

Præcipe for Transcript.

(Filed Sept. 21, 1909).

To the clerk of the above entitled court:

You will please prepare a transcript of the record in this case to be filed in the office of the Clerk of the United States supreme court under the appeal heretofore perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit: Bill of complaint, appearance of Ralph W. McCrillis and Ethelbert Ward for respondent, demurrer to the bill of complaint, notice of hearing, order overruling demurrer, answer, supplemental answer, replication, complainant's testimony, respondent's testimony, final decree, petition on appeal, assignment of errors, order allowing appeal by respondent, citation and bond on appeal, and all other orders, stipulations, depositions, and papers, constituting the entire record in the above court.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States and on file in the offices of the clerks of said courts before the — day of ——, 1909.

RALPH W. McCRILLIS,
JOHN T. BARNETT,
JAMES H. TELLER,
Solicitors for Appellant.

544 (Endorsed:) In Equity. No. 5153. United States Circuit Court, for the Eighth Judicial Circuit. United States of America, Complainant, vs. Fred Light, Defendant. Præcipe for Transcript of Record. Filed Sep. 21, 1909. Charles W. Bishop, Clerk.

545 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to an appeal allowed by the Circuit Court of The United States for the district of Colorado, wherein Fred Light is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the District Court of the United States for the district of Colorado and ex officio Judge of the circuit court of the United States for the district of Colorado, at Denver, in said district, this thirteenth day of September, A. D. 1909.

ROBT. E. LEWIS, *Judge.*

Proof of Service.

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

On this — day of ——, A. D. 1909, personally appeared —— —— before me, the subscriber, clerk of the circuit court of the United States, for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — day of ——, A. D. 1909.

—— ——.

Service of within citation accepted at Denver this 13th Sept., 1909.

THOMAS WARD, JR.,
U. S. Att'y.

[Endorsed:] No. 5153. The Supreme Court of the United States. Fred Light, Plaintiff in error, versus The United States of America, Defendant in error. Citation. Filed Sep. 13, 1909. Charles W. Bishop, Clerk.

546 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages, bound in two (2) volumes, and numbered from one (1) to three hundred twelve (312) and from three hundred fifteen (315) to five hundred forty four (544), all numbers inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe, heretofore filed or entered of record in said court and in a certain cause lately in said court pending wherein The United States of America was complainant and Fred Light was respondent, as fully and completely as the same still remain on file and of record in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this twenty-seventh day of October, A. D. 1909.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

547 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

5153. In Chancery.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

This cause coming on now to be heard, and it appearing that the transcript of the record on appeal to the Supreme Court of the United States can not be completed within the return day of the citation herein;

It is ordered that the return day of the citation on appeal to the Supreme Court of the United States be, and the same is hereby, enlarged and extended for thirty (30) days.

ROBT. E. LEWIS, *Judge.*

October 1, 1909, Denver, Colorado.

548 [Endorsed:] No. 5153. United States Circuit Court, District of Colorado. United States of America vs. Fred Light. Order enlarging the return day of citation. Filed Oct. 1, 1909. Charles W. Bishop, Clerk. 30/377.

549 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

5153. In Chancery.

THE UNITED STATES OF AMERICA
vs.
FRED LIGHT.

Bill for an Injunction and for Other Relief.

This cause coming on now to be heard, and it appearing that the transcript of the record on appeal to the Supreme Court of the United States can not be completed within the return day of the citation herein;

It is ordered that the return day of the citation on appeal to the Supreme Court of the United States be, and the same is hereby, enlarged and extended for fifteen (15) days.

ROBT. E. LEWIS, *Judge.*

October 25th, 1909, Denver, Colorado.

550 [Endorsed:] No. 5153. U. S. Circuit Court, District of Colorado. The United States vs. Fred Light. Order enlarging return day of citation 15 days. Filed Oct. 25, 1909. Charles W. Bishop, Clerk. 30/435.

551 In the Supreme Court of the United States.

No. 667, October Term, 1909.

FRED LIGHT, Appellant,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Appeal from the Circuit Court of the United States within and for the District of Colorado.

Statement of Errors.

To Honorable James H. McKenney, Clerk of the Supreme Court of the United States:

Fred Light, the appellant in the above entitled cause, in compliance with the ninth paragraph of the tenth rule of the Supreme Court, hereby states that in the prosecution of this appeal he intends to rely upon the following errors assigned on the record of said cause, to-wit:

That the Court erred,

1st. In overruling the demurrer interposed by the defendant to the bill of complaint in said cause, and requiring the defendant to make answer thereunto;

2nd. In entering a final decree therein in favor of the complainant and against the defendant in accordance with the prayer of the complaint;

3rd. In rendering said decree, because the defendant was thereby perpetually enjoined from causing, suffering, permitting or allowing his cattle, horses and live stock from going within or
552 remaining upon the Holy Cross Forest Reserve, described in said complaint, in contravention of the regulations of the Department of Agriculture in said complaint recited, and relating thereto;

4th. Because the statute authorizing, or purporting to authorize said regulations, is in contravention of the Constitution of the United States;

5th. Because the Court in and by said decree determined the complainant to be exempt from the municipal laws of the state of Colorado concerning fences, and the maintenance thereof, being an Act entitled "An Act concerning fences and repealing Chapter XXXIX of the General Statutes of the state of Colorado, entitled, 'Fences,'" approved April 10th, 1885.

6th. Because the various acts of Congress and proclamations of the President of the United States alleged and relied upon in the bill of complaint, whereby the said Holy Cross Forest Reserve was created, are unconstitutional exercises of power by the Congress and by the President of the United States acting thereunder, and being in excess of said powers, are unconstitutional and void.

7th. Because said Court by said decree recognized the validity of and enforced said rules and regulations of the Secretary of Agriculture, recited in said complaint; that the exercise of said power by the Secretary of Agriculture consists of an unlawful and unconstitutional delegation of authority to him, in consequence whereof said rules and regulations are void and of no effect;

8th. Because the said court in and by said decree determined and decided that the Congress and the President of the United States possessed constitutional power and right to organize the public domain within the state of Colorado into reservations and to operate the same and utilize the resources thereof as a source of profit to the United States;

553 9th. Because the said rules and regulations mentioned in said bill of complaint are unreasonable, do not insure or tend to insure the objects of forest reservation, and constitute an unconstitutional, unlawful and unwarranted interference by the Government of the United States with the fence and other statutes of the state of Colorado enacted through the constitutional exercise of the police power of said state, the contrary thereof being determined by said court in said decree;

10th. Because the consent of the state of Colorado to the establishment by Congress or by the President of the United States, acting under its authority, of the said Holy Cross Forest Reserve, is constitutionally essential to the validity thereof; that without such consent the said reservation and the proclamation of the President creating the same is of no force or effect under the Constitution of the United States, but that the said decree determines the contrary;

11th. Because the rights asserted by the complainant in its bill of complaint are in violations of the terms of the act of Congress commonly called the "Enabling Act" whereby the state of Colorado was permitted to adopt a constitution and be admitted into the Union upon an equality with the other states thereof, the contrary being determined by the said circuit court;

12th. Because the public lands of the United States are held in trust by the General Government for the people of the several states, and the proclamation creating the said Holy Cross Forest Reserve without the consent of the people of Colorado thereto, duly expressed by an act of the General Assembly, is contrary to and in violation of the said trust, and therefore of no effect;

13th. Because the said court was without jurisdiction to hear and determine the said cause;

554 14th. The court further erred in not making, rendering and entering a decree in favor of the defendant and against the complainant upon the record;

15th. And the court erred in other matters and things appearing upon the face of said record;

That he considers the following named parts of the record necessary to be considered in connection with said assigned errors, to-wit:

The pleadings and the decree; all the evidence, excluding, however, the exhibits, except only complainant's exhibit 1 (a map); complainant's exhibit 4 (proclamation and map); defendant's ex-

hibit K (proclamation and map), which three exhibits should b printed with the evidence.

JOHN T. BARNETT,
JAMES H. TELLER,
Attorneys for Appellant.

Received a copy of the above Statement this 2nd day of December A. D. 1909.

THOMAS WARD, JR.,
U. S. Att'y for Colorado,
Solicitors for Appellee.

555 [Endorsed:] 667, 21893. In the U. S. Supreme Court No. 667. October Term, 1909. Fred Light, Appellant, vs United States of America, Appellee. Statement of Errors

556 [Endorsed:] File No. 21893. Supreme Court U. S October Term, 1909. Term No. 667. Fred Light Appel lant, vs. The United States. Statement by counsel for appellant o errors intended to be relied upon and designation of parts of record to be printed and proof of service of same. Filed December 6, 1909

Endorsed on cover: File No. 21,893. Colorado C. C. U. S. Term No. 667. Fred Light, appellant, vs. The United States. Filed November 8th, 1909. File No. 21,893.

Nov. 2 1910. No. 860

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1910

FRED LIGHT, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

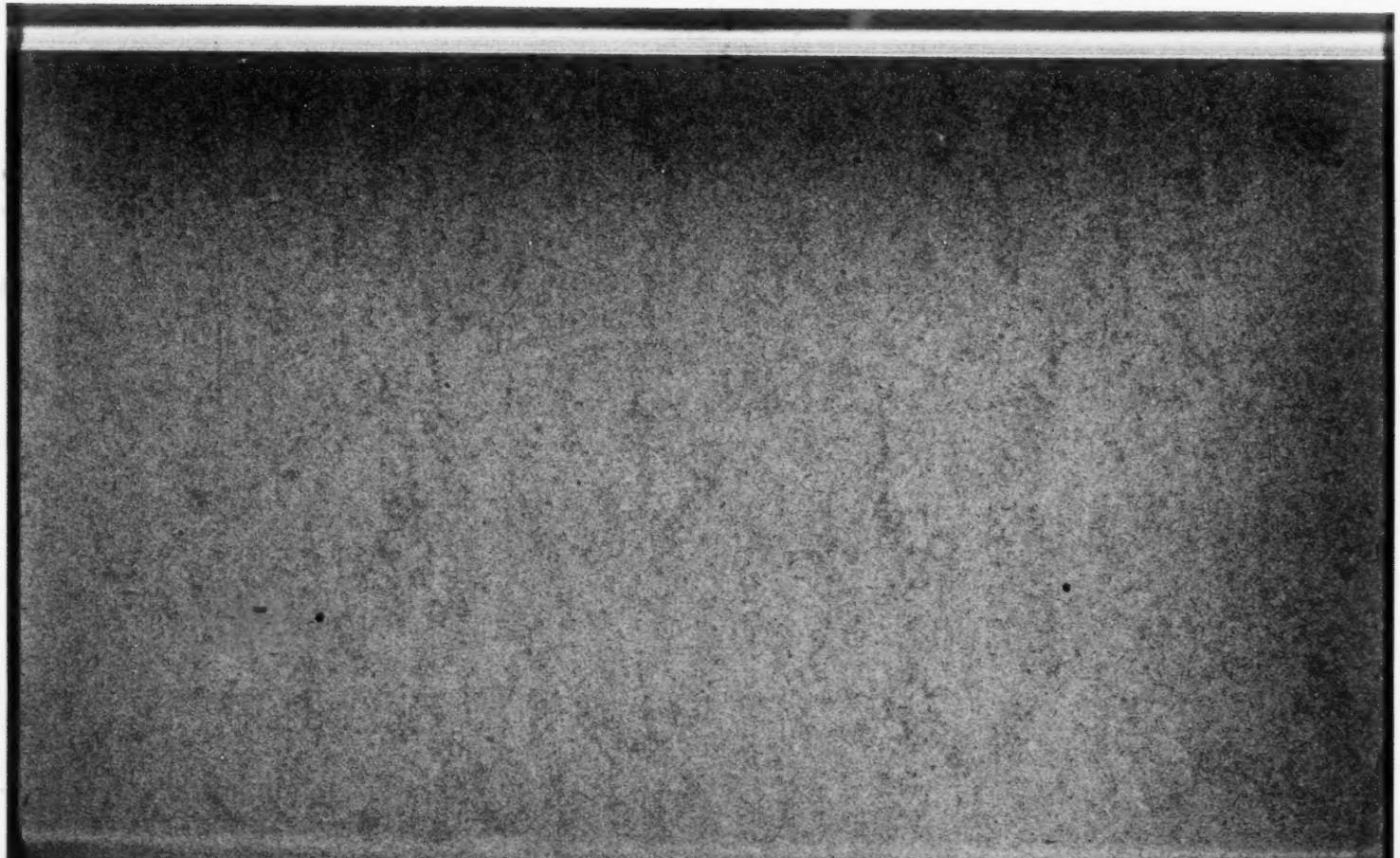
Appeal from the United States Circuit Court for the District of Colorado.

MOTION TO ADVANCE CAUSE

C. S. THOMAS,
E. C. STIMSON,
H. M. TELLER,
MILTON SMITH,
H. A. HICKS,
RALPH W. McCRILLIS,
Of Counsel.

JOHN T. BARNETT,
Attorney General of Colorado,
JAMES H. TELLER,
Attorneys for Appellant.

THE SMITH-BROOKS PRINTING COMPANY, DENVER, COLO.



SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1909.

No. 667

FRED LIGHT, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States Circuit Court for the District of Colorado.

MOTION TO ADVANCE CAUSE.

Comes now the appellant, by his counsel, and moves the court to advance said cause, and for grounds of said motion shows to the court that the appeal prosecuted herein seeks to reverse a judgment and decree of the United States Circuit Court for the District of Colorado, by which the appellant is perpetually enjoined from permitting his cattle or other live stock from going, staying or remaining upon the

Holy Cross Forest Reserve, which is a considerable tract of the public domain situated in the state of Colorado, and not protected by a fence on any of its boundaries.

The Supreme Court of Colorado has several times held that the common law rule as to fences is not in force in the state of Colorado; and a state statute permits the recovery of damages because of trespass by live stock only in case such trespass occurs on lands protected by a fence of prescribed material and construction.

The granting of said injunction is in effect a holding by the Circuit Court that the said rules and statute as to fences do not apply to, and are not in force on said forest reserve; which is to say that the forest reserves are not subject to the general police power of the state. It is an attempted resumption by the federal government of jurisdiction over a part of the state, without the consent of the state legislature thereto, as is required by the United States Constitution. Inasmuch as nearly one-fourth of Colorado is within forest reserves, the question thus presented becomes one of state-wide interest, and, since other states are affected by this ruling, the matter is one of general public concern.

Because of the importance of the subject involved in this litigation, the attorney general of Colorado has assumed the direction of this cause, in behalf of the appellant, under and in pursuance of an act of the last legislative assembly of Colorado making an appropriation to aid in the prosecution or defense of such suit or suits as might properly present the question for final determination, to the end that the respective rights and powers of the state and the fed-

eral government concerning public lands and waters within the state may be adjudicated by this court.

Because of these facts, it is submitted that the cause should be advanced, so that the conflict of jurisdiction over these important subjects may be speedily settled.

JOHN T. BARNETT,
Attorney General of Colorado,

JAMES H. TELLER,
Attorneys for Appellant.

C. S. THOMAS,
E. C. STIMSON,
H. M. TELLER,
MILTON SMITH,
H. A. HICKS,
RALPH W. McCRILLIS,
Of Counsel.

No. 360.

FILED
JAN 14 1911

In the Supreme Court of the United States.

~~October Term, 1910. No. 360.~~

FRED LIGHT, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

Appeal from the Circuit Court of the United States for the District of Colorado.

BRIEF OF APPELLANT.

HENRY M. TELLER,
C. S. THOMAS,
E. C. STIMSON,
MILTON SMITH,
H. A. HICKS,
RALPH McCRILLIS,
Of Counsel.

JOHN T. BARNETT,
Attorney General of Colorado,
JAMES H. TELLER,
Attorneys for Appellant.

THE SMITH-BROOKS PRESS, DENVER.

Compliments of

JOHN T. BARNETT

Attorney General of the State of Colorado

In the Supreme Court of the United States.

OCTOBER TERM, 1909. No. 667.

FRED LIGHT, APPELLANT.

vs.

THE UNITED STATES, APPELLEE.

Appeal from the Circuit Court of the United States for the District of Colorado.

BRIEF OF APPELLANT.

This is an appeal from a decree of the Circuit Court of the United States for the district of Colorado, perpetually enjoining the appellant from permitting his cattle to stray upon the Holy Cross Forest Reserve.

The bill of complaint alleges that the president of the United States by proclamation duly made reserved from entry and set apart as a public reservation, to be known as the Holy Cross Forest Reserve, a large body of public lands of complainant within the limits of the state of Colorado, and that the same constitutes "a public forest reservation, devoted to the ef-

fectuation of complainant's laws and policy touching the preservation and use of the national forests"; that the defendant is a breeder of cattle residing and carrying on his business near the said forest reserve; that the defendant had, subsequent to the establishment of said reserve, turned his cattle upon the unreserved public lands near his ranch, well knowing that they would trespass upon the said reserve by going thereon to graze; that his said cattle did so trespass upon said reserve and that the said defendant threatened and intended thus to allow his cattle to trespass, feed and graze upon said reserve, involving repeated, continued and persistent trespasses upon complainant's property.

The prayer of the bill was that defendant be perpetually enjoined from causing or permitting his cattle so to trespass upon said reserve.

To this bill a general demurrer was filed and overruled. Defendant then answered, admitting that he had thus turned his cattle upon the public lands near the reserve; alleged that said reserve was not fenced; that it was subject to the law of the state of Colorado concerning fences, and that the setting apart of said reserve without the consent of the state was in violation of the Constitution and without effect.

The case was heard upon the bill, answer and evidence, and a decree entered in accordance with the prayer of the bill. The evidence shows that the reserve was not fenced.

ASSIGNMENT OF ERRORS.

It is assigned as error that the demurrer to the bill was improperly overruled because stating no

cause of action against defendant, and that the decree should have been in favor of defendant and dismissing the bill.

BRIEF AND ARGUMENT.

The effect of the decree enjoining appellant from allowing or permitting his cattle to go upon an unfenced reserve, is to compel him either to secure a permit from the forestry service and rent pasturage from the government, or herd his cattle from the land.

The decree, therefore, denies in effect that the laws of Colorado concerning fences, by which a stock-owner is exempt from obligation to keep his cattle from unfenced land, is in force on lands set apart as a forest reserve.

The errors assigned present for determination two principal questions:

(1) The question, above suggested, of the operation on the forest reserves of laws of the state enacted in the exercise of its general police powers, assuming that the reservation has been lawfully established; and,

(2) Has the federal government the constitutional capacity permanently to devote large tracts of the public domain within the boundaries of a state to purposes other than governmental?

I.

Taking up these questions in their order, it is natural to inquire what is the origin of this supposed

exemption of forest reserves from the jurisdiction of the state in the matter of police regulations.

This court has, from the first, recognized and declared that the jurisdiction of a state extends over all the territory within its boundaries.

> "A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered nor restrained by the federal Constitution."
>
> City of New York vs. Miln, 11 Pet., 139.

To the same effect are:

> Pennoyer vs. Neff, 95 U. S., 714.
> Van Brocklin vs. Anderson, 117 U. S., 158.
> Kansas vs. Colorado, 206 U. S., 93.

It is, therefore, incumbent upon one who asserts the existence of such exemption to point out the act of cession, or the constitutional provision from which it arises.

It seems, however, that some who contend for this exemption find its basis in the fact that title to the reserves is in a sovereign government. But if that be its source, it must extend to all lands so held, and hence unreserved public lands are not subject to the state's jurisdiction. This, it is believed, no one will assert; for if it be true, states containing public lands are, and have for years been, exercising jurisdiction

in large districts over which they have not and never have had authority.

Under this doctrine it follows that innumerable occupants of government lands have been unlawfully taxed upon their personal property there situate, and others have been convicted of offenses without warrant of law.

It is settled by the rulings of this court, and of other courts of high standing, that the government holds title to public lands, not as a sovereign, but as a proprietor merely. This, of course, applies only to public lands properly so called, and not to lands used for governmental purposes.

The case of Pollard's Lessee vs. Hagan, 3 Howard, 212 (1845), was said by Justice Catron to be the most important case that had, up to that time, been before the court. It involved the question of title to the bed of navigable waters in the state of Alabama. It was insisted that the general government held title to such lands as a sovereign right. The court held that Alabama was admitted into the Union upon an equal footing with the other states, and that the federal government held the lands only as a proprietor, and said:

> "We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction or right of soil in and to the territory of which Alabama, or any of the new states were formed, except for temporary purposes and to execute the trusts created by the acts of Virginia and Georgia legislatures, and the deeds of cession executed by

them to the United States and the trust created by the treaty with the French Republic, of the 30th of April, 1803, ceding Louisiana.

* * * * * *

"When Alabama was admitted into the Union on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it. Nothing remained to the United States according to the terms in the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.

* * * * * *

"The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the Union,

must be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands.

* * * * * *

"We therefore think the United States hold the public lands within the new states by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a state. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession.

* * * * * *

"Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation."

In *Woodruff vs. N. Bloomfield G. M. Co.*, 18 Fed., 772, Judge Sawyer said:

"Upon the admission of California into the Union upon an equal footing with the original states, the sovereignty for all inter-

> nal municipal purposes, and for all purposes, except such purposes and with such powers as are expressly conferred upon the national government by the Constitution of the United States, passed to the state of California. Thenceforth the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor, except that the state under the express terms upon which it was admitted could pass no law to interfere with their primary disposal, and they were not subject to taxation. In all other respects the United States stand upon the same footing as private owners of land."

In *People vs. Scherer,* 30 California, 658, the court say:

> "The relation of the United States to the public lands since the admission of California into the Union is simply proprietary, —that of an owner of lands like any citizen who owns lands, and not that of municipal sovereignty."

In *Camp vs. Smith,* 2 Minn., 131, the court held that the state could tax lands after entry at the land office, saying:

> "The United States has but a proprietary interest in the public lands within the several states. The sovereignty is in the states."

In *Hendricks vs. Johnson,* 6 Porter (Ala.), 472, the court said:

> "The United States have no other right within the several states than as a land holder, and when they grant a portion of their domain, only such rights as are incidental to the land pass to the purchaser."

In *United States vs. Bridge Co.,* 6 McLean, 517, the court affirmed the right of an Illinois corporation to build its road over government land not held for private entry and sale, but not reserved for a public purpose. Justice McLean said:

> "Within the limits of a state Congress can, in regard to the disposition of the public lands and their protection, make all needful rules and regulations. But beyond this it can exercise no other acts of sovereignty which it may not exercise in common over the lands of individuals. * * * The proprietorship of land in a state by the general government, cannot, it would seem, enlarge its sovereignty or restrict the sovereignty of the state. This sovereignty extends to the state limits over the territory of the state, subject only to the proprietary right to the lands owned by the federal government, and the right to dispose of such lands and protect them under such regulations as it may deem proper.
>
> "It is difficult to perceive upon what principle the mere ownership of land by the

> general government within a state should prohibit the exercise of the sovereign power of the state in so important a matter as the easements named. * * * The right claimed for the state has no reference to lands specially appropriated, but to those held as general proprietor by the government, whether reserved or not."

The case of *United States vs. Chicago,* 7 Howard, 185, involved the right of the city to open streets through the Fort Dearborn reservation. The right was denied because its exercise interfered with the public use for which the reservation had been made; but the court said:

> "It is not questioned that land within a state purchased by the United States as a mere proprietor and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain. * * *
>
> "It seems, too, that the land purchased within a state for ordinary purposes by the general government must yield to the local public demands, yet land when held like this, at first by an original cession to that government, and afterwards appropriated for a specific public object, can not easily be shown liable to be taken away for an ordinary local object, though public, and especially when under another government and by mere implication."

The text shows that the special purposes mentioned included purely governmental purposes, such as for forts, etc.

This seems to be the rule equally, whether the land belonged originally to the United States or had been purchased by it. Judge Story, in United States vs. Cornell, 2 Mason, 60, said:

> "But though the United States may well purchase and hold land for public purposes within the territorial limits of a state, this does not of itself oust the jurisdiction or sovereignty of such state over the land so purchased. It remains until the state has relinquished its authority over the land, either expressly or by necessary implication."

It should be observed here that it is a fundamental rule of law that sovereignty is not to be taken away by implication.

People vs. Godfrey, 17 Johns., 225.

That the states would have jurisdiction unless relinquished by formal act, is suggested by section 8 of article 1 of the Constitution, which gives the United States exclusive jurisdiction "over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

That these are to be purchased with the consent of the Legislature, is the material provision bearing upon the question now under consideration.

Story, in his Commentaries on the Constitution, says:

> "If there has been no cession of the place by the state, although it has been constantly occupied and used, under purchase or otherwise, by the United States, for a fort or arsenal or other constitutional purpose, the state jurisdiction still remains complete and perfect."
>
> Story on the Constitution, section 1227, 5th Ed.

The case of *Fort Leavenworth Ry. Co. vs. Lowe*, 114 U. S., 525, grew out of the following circumstances:

For many years prior to the admission of Kansas, the United States had used a considerable tract of land for a fort, known as Fort Leavenworth. In admitting Kansas into the Union, no reservation of jurisdiction over this tract was made. Afterwards Kansas ceded to the government exclusive jurisdiction over the tract, saving the right to serve process and to tax railroads and other corporations on said reservation. The appellant in the case paid a tax under protest and brought suit to recover it. This Court affirmed the decision of the Kansas Supreme Court, denying the right to recover. In the opinion by Justice Field, it is said:

> "The United States, therefore, retained after the admission of the state only the rights of an ordinary proprietor, except as an instrument for the execution of the powers of

> the general government; that part of a tract which was actually used for a fort or military post, was beyond such control of the state by taxation or otherwise as would defeat its use for those purposes. So far as the land constituting the reservation was not used for military purposes, the position of the United States was only that of an individual proprietor. The state could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties."

In discussing the power of the United States to purchase land for forts, etc., the court further said:

> "Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals."

The court again points out that forts, arsenals and other public buildings for the use of the general government as instrumentalities for the execution of its powers, must, of necessity, be free from state jurisdiction, and that this exemption is essential to the sovereign authority of the United States, and adds:

> "* * * But when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits."

In *Mobile vs. Eslava*, 16 Peters, 277, the court emphasized the fact that the United States hold land as an individual, and said:

> "The clause inserted into the Constitution of Alabama reserving the rights of property to the United States as a compact with them, embraces lands under water as emphatically as those not covered with water; but if no stipulation saving the interest of the United States had been made, they would have had just as much right to their private property as an individual had to his. They held as a corporation an individual title. * * * The United States as owner can do no act to obstruct the free public use of waters more than a private owner of the soil under water could obstruct the navigation."

In the case of *People vs Godfrey*, 17 Johns, 225, it was held that the state of New York had criminal jurisdiction over land used by the United States as a fort, no cession having been made by the legislature. The court said:

> "We are of the opinion that the right of exclusive legislation within the territorial

> limits of any state can be acquired by the United States only in the mode pointed out in the Constitution, by purchase, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

It can hardly be claimed that a forest reserve, however beneficial, is in fact an instrument of government and necessary to the exercise of national sovereignty.

Even in those cases in which there is a cession of jurisdiction by the state subsequent to the adoption of a fence law, the law prevails on such lands until repealed by the general government. This is directly held in the case of

> C., R. I. & P. Ry. Co. vs. McGlinn, 114 U. S., 542,

which also involved the Fort Leavenworth reservation. Kansas, by statute, made every railroad company in the state liable for the full value of cattle killed on a railroad unless the road was fenced. This law was invoked in a suit for the killing of an animal on the reservation. The court said:

> "The government of the state of Kansas extended over the reservation, and its legislation was operative therein except so far as the use of the land as an instrumentality of the general government may have excepted it from such legislation. In other respects, the law of the state prevailed.

> There was a railroad running through it when the state ceded jurisdiction to the United States. The law of the state making the railroad liable for killing or wounding cattle by its cars and engines where it had no fence to keep such cattle off the road, was as necessary to the safety of the cattle after the cession as before, and was no more abrogated by the mere fact of cession than regulations as to the crossing of highways by the railroad cars and the ringing of bells as a warning to others of their approach."

If the fence law would thus apply on territory of which the jurisdiction had been ceded by a state, it certainly is not ousted by the mere act of reserving public lands for forestry purposes.

These authorities establish, beyond question, the fact that the ownership by the general government of land within a state, does not carry with it general rights of sovereignty over such lands.

It is further urged that congress, under the power granted by paragraph 2, section 3, of article IV of the Constitution, has authorized the reservation of lands and the making of rules, under which the decree is justified.

That paragraph reads as follows:

> "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other

> property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

In support of this contention, counsel for appellee in the court below cited many cases in which this provision was considered, and in which very broad powers were claimed for congress as arising from it. But those cases all had to do with the question of right to control and dispose of public lands, matters concerning the passing of title and methods of disposition. None of them involved this question of jurisdiction; and it is believed no case can be found in which the provision in question has been held to confer upon congress the right to limit the general powers of a state. Of this provision, the court, in *Kansas vs. Colorado, supra,* said:

> "Clearly, it does not grant to congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."

Manifestly, if the federal government has jurisdiction over these reservations to the extent necessary to support this decree, the state is deprived of its police power over a large portion of its territory. That the police power of a state extends over all of its territory and is exclusive, is well settled.

> "Police power extends over all subjects within the territorial limits of the state, and

has never been conceded to the United States."

Prigg vs. Commonwealth, 16 Peters, 639.

"Police power is exclusive in the several states."

The Slaughterhouse Cases, 16 Wall., 63.

"A state's police power is inherent and not surrendered to the general government, nor restrained by the Constitution."

In re Rehrer, 140 U. S., 554.

"It cannot be denied that the power of a state to protect the lives, health and property of its citizens and to preserve good order and the public morals, the power to govern men and things within the limits of its dominion, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

United States vs. Knight, 156 U. S., 11.

To the same effect:

L'Hote vs. New Orleans, 177 U. S., 597.

This construction of the statute for which we contend is not in conflict with the case of United

States vs. Camfield, 167 U. S., 518, in which the right of Congress to prohibit the fencing of public lands by persons without interest therein was upheld. To enclose land is to assert an exclusive right to its use, and is, therefore, in a sense a taking of possession of it. Indeed, the act under consideration in that case was entitled: "An act to prevent unlawful occupancy of the public lands."

Such an enclosure is, of course, an interference with the right of control and disposition which is admittedly in Congress. Thus to prohibit fencing land is to legislate as to what shall be done with or upon the land; while the decree in this case determines what the appellant shall do outside the reservation. Its effect is to compel him to keep his cattle within an enclosure, or so to herd them that they will not go upon the reserve. This is not the enforcement of an act of Congress, but the application of a rule of equity, that continued trespassing may be enjoined—an assumption, necessary to the decree, being that an act is a trespass, which, under the law of the state, is no trespass.

It should be observed that in the case last cited, the court fully recognizes that in prohibiting fencing the government is exercising only the rights of an ordinary proprietor. It says:

> "While the lands in question are all within the state of Colorado, the government has, with respect to its own land, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with its

farming property. It may sell or withhold them from sale. It may grant them in the aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market. It needs no argument to show that the building of fences on public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the government or by the ordinary processes of the courts of justice. To this extent no legislation was necessary to vindicate the rights of the government as a landed proprietor.

"But the evil of permitting persons who own or control alternate sections to enclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed the act of February 25, 1885, forbidding all enclosures of public lands and authorizing the abatement of the fences. If the act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the government as an ordinary proprietor would have the right to prosecute for such trespass. It is only by treating it as prohibiting all enclosures of public lands, by

whatever means, that the act became of any value."

It should not be overlooked that the court bases the right to prevent the fencing of public lands upon the fact that such fencing would retard the settlement of the lands, which is the purpose for which the government holds them as a trustee.

The result of this decree, as before stated, is, that state laws passed in the exercise of the police power are not operative on the public domain. This, in fact, is claimed to be the ruling of the Circuit Court of Appeals of the Ninth Circuit, in Shannon vs. United States, 88 C. C. A., 52.

That case, however, is not authority to the effect claimed. It there appeared that the appellant had turned between 3,000 and 3,500 sheep into a field of 320 acres, without water, and separated from the reserve, with good grazing and water, only by a wire fence which had been, as appears from the statement of facts, opened in several places by appellant himself. The court found that his acts as above stated were equivalent to driving his stock upon the reserve. To drive one's cattle upon the land of another without his consent is a trespass, whether the land be fenced or not. So much, therefore, of the opinion as may be supposed to state the law in a case with facts like those under consideration, not being necessary to a decision of the case, is mere dictum and is supported by no adjudged cases. It is, therefore, not authority in this cause.

No one, it is presumed, will deny that a statute concerning fences and the trespasses of live stock is proper legislation under the police power of the state. It is everywhere thus treated and comes clearly within the definition of police power, as applied in Bacon vs. Walker, 204 U. S., 317, which involved a law prohibiting the pasturing of sheep within a specified distance of a dwelling house.

Rideout vs. Knox, 148 Mass., 368, holds that an act prohibiting the erection of a fence "unnecessarily exceeding six feet in height" is within the limits of the state's police power.

This decree is contrary not only to the statutes of the state concerning fencing and live stock, but to the law as laid down by the state Supreme Court prior to the adoption of these laws. As early as 1880, in Morris vs. Fraker, 5 Colo., 425, it was held that the common-law rule requiring stock owners to keep their stock within their own grounds was not applicable to the conditions in Colorado, and hence that law was not in force. Cases subsequent to the adoption of the fence law are to the same effect, the statute not being invoked to sustain the rule. The recent case of Richards vs. Sanderson, 39 Colo., 278, makes no reference to statutory law. The court says:

> "One who turns his cattle out to graze unrestrained upon lands where he has a right to turn them, knowing that they will probably wander on the uninclosed premises of another, is under no obligation to prevent them entering upon such premises, and if

> they do so enter, through following their natural instincts, he is not responsible for the damages occasioned thereby—Martin vs. Platte Valley Sheep Co., supra. This proposition is clearly applicable to the case of one who does no more than turn his cattle upon the public domain to graze, even though he knows that, following their natural instincts, they may wander upon the uninclosed lands of his neighbor."

In *Buford vs. Houtz*, 133 U. S., 320, the court held that the common-law rule above mentioned was not adapted to the conditions existing in this country in the progress of settlement, and was not, therefore, in force—citing cases from the courts of several states, both east and west.

The effect of these rulings is to permit the owners of cattle to allow them to range at will; and the decree under consideration thus denies to stockmen the rights to which the state courts have held them entitled under the common law, as modified to suit local conditions.

In 1885 a fence law was enacted, but it did no more than express in statutory form what was already the law of the state, except so far as it defined a lawful fence. (Session Laws 1885, page 220; sections 2987 et seq., R. S. Colo., 1908.)

The gist of the statute is that damages from trespass by animals are not recoverable unless the premises on which such trespass occurs are enclosed by a lawful fence as therein prescribed. In view of the fact that this law of free range had, prior to the adoption

of the statute, been judicially determined to be in force in this state and in the states generally, a statute which is merely declaratory of the existing law can be construed as exempting any portion of the state from its operation only in case such exemption is made by express terms.

The rule in this case, as in others, must be that exemptions are not implied. The statute, therefore, must be taken for what it clearly appears to be—a general law operating throughout the entire state.

Moreover, thus to limit the jurisdiction of states containing forest reserves is to deny to them that equality with other states to which they are entitled.

> "Equality of constitutional right and power is the condition of all the states of the Union, old and new."
>
> Escanaba Co. vs. Chicago, 107 U. S., 678.

In *Ward vs. Race Horse,* 163 U. S., 504, it is held that to give effect to an Indian treaty so as to prevent the operation of a state game law, is to deny to the state equality with other states. Hence it was held that the treaty was abrogated by the act admitting the state into the Union.

The court, after asserting the equality of the states, said:

> "Determining by these principles the question whether the provision of the treaty

giving the right to hunt on unoccupied land of the United States, in the hunting districts, is repealed, insofar as the lands in such districts are now embraced within the limits of the state of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting the state into the Union. The two facts—the privilege conferred and the act of admission—are irreconcilable in the sense that the two, under no reasonable hypothesis, can be considered as co-existing.

"The power of all the states to regulate the killing of game within their borders will not be gainsaid. Yet, if the treaty applies to the unoccupied land of the United States in the state of Wyoming, that state would be bereft of such power, since every parcel or piece of land belonging to the United States as a private owner, so long as it continues to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of the legislative power vested in all the other states of the Union—a power resulting from the fact of statehood and incident to its plenary existence."

It will be observed that the court here speaks of the public land of Wyoming as "belonging to the United States as a private owner," which supports

the contention heretofore made in this case. It would be difficult to determine upon what principle the right of a state to enact and enforce a game law would be held of greater value and importance than the right to determine what should constitute a trespass committed by live stock.

If, to uphold the sovereignty of a state in the matter of a game law, a treaty made by Congress is held to be repealed as inconsistent with the higher right in the state, it would seem to be necessary that those who assert that the mere ownership of land by the federal government, or the necessities of a policy adopted by the head of a department, abrogate a sovereign right of a state, should produce some authority, express and positive, for such contention. How large a portion of Wyoming would have been exempted from the operation of the game law does not appear, but as the court holds that they were restricted to hunting districts, it is probable that the area covered was not large. This court will take judicial notice of the proclamations of the president which have set aside as forest reserves within the state of Colorado an area of 21,309 square miles, more than one-fifth of the area of the state.

In the case of *Kansas vs. Colorado, supra,* the court admits that the national government cannot enter the territory of one of the newer states and legislate in respect to improving by irrigation or otherwise lands within their borders, unless it has the same power in the older states.

If the exemption claimed for the forest reserves is good in the state of Colorado, a like exemption would be good in the state of New York in case the

government became the owner in fee of lands therein. Yet, we have seen from the cases cited that the courts uniformly deny that such would be the case.

This court has always recognized the fact that an act of Congress cannot restrict the sovereignty of a state except under express constitutional authority therefor.

In Withers vs. Buckley, 20 Howard, 84, the court said:

> "In considering this act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new state in any of its necessary attributes as an independent sovereign government, or to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the Constitution adopted by the states, and from the rule of interpretation pronounced by this court in the case of Pollard's Lessee vs. Hagan, 3 How., 223."

Every question of constitutional power must be resolved so as not to conflict with other powers which are established, defined and undoubted.

The equality of the states under the federal Constitution is fundamental—a part of the very structure of our system of government. It is guaranteed

by statute and exists without statute (Ward vs. Race Horse, supra). It is a limitation on every implied power which otherwise would infringe upon the rights of a state.

Any constitutional provision which requires a construction to determine its scope must necessarily be so limited in its application as not to conflict with this positive and thoroughly determined fact of equality.

The authority of Congress to dispose of and protect public lands, which has frequently been judicially asserted, must therefore be so limited as not to deprive one state of an attribute of sovereignty which is conceded to other states.

Inasmuch as national forest reserves have been established in several of the western states, covering in one instance at least a larger portion of the state's area than is involved in Colorado, the question here raised is of the utmost importance to such states.

Indeed, the question is important to all the states as determining the proper relation of the states to the general government. If the jurisdiction of a state is ousted by the fact of federal ownership, or, by an act of Congress, as to one police regulation of the state, it is ousted as to all such regulations. Accordingly, if forest reserves are exempt from the application of the fence law, they are not subject to laws concerning branding, inspection of live stock and other regulations. In fact, it would seem that none of the state laws would be in force on forest reserves.

Congress itself, in the act of June 4, 1897, recognized that these reserves must continue under state jurisdiction:

> "The jurisdiction, both civil and criminal, over persons within such reservations, shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the state wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the state."
>
> (Stat. L., 36.)

It is clear, then, that there is no such exemption in Colorado, and that the decree here under consideration, being necessarily based upon such a supposed exemption, was erroneous.

II.

If it be found that our first contention is well grounded, the second question named for discussion need not be considered; but if, on the other hand, it be held that the state laws do not extend over a legally established forest reserve, the second question is still important and must be determined.

That question is: Have the lands described in the president's proclamation as constituting the Holy Cross Forest Reserve been legally set apart as a per-

manent disposition thereof for the purposes in said proclamation mentioned?

This, of course, involves the power of Congress to authorize such a reservation. If there is such power in Congress, a further question is presented as to whether or not it can be exercised within a state without the state's consent.

The question of power is first to be considered.

Here, as in regard to exemptions from state laws, it is necessary that the provision from which the power is derived should be definitely pointed out. It can, of course, be based on no other than the constitutional provision already discussed. If the power of disposition granted by that section includes the right permanently to withdraw these immense areas of public lands from settlement, and to devote them to growing trees, cutting lumber, pasturing cattle at a charge, and otherwise making them a perpetual source of revenue to the general government, it has never been so treated by this court in any of the numerous cases in which the section was under consideration. The very definition of public lands contradicts such a proposition. Lands thus defined are those which are open for sale or other disposition under general laws.

Newhall vs. Sanger, 92 U. S., 761.

Bardon vs. N. P. R. R. Co., 145 U. S., 535.

The uniform holding of this court has been that the government holds public land in trust for the people, to be disposed of so as to promote the settlement and ultimate prosperity of the states in which they are situated.

"The United States do not and cannot hold property as a monarch may, for private or personal purposes."

Dobbins vs. Commissioners, 17 Peters, 435.

"Although the title to the soil under the tide waters of the bay was acquired by the United States, by cession from Mexico, equally with the title to the upland, they hold it only in trust for the future state."

Weber vs. Commonwealth, 18 Wall., 57.

"Public domain is held by the government as a part of its trust. The government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and under certain circumstances to invest the individual states with the sole possession of the title, which until then had been common with the people as the beneficiaries of the trust."

U. S. vs. Beebee, 127 U. S., 348.

"Territories acquired by Congress, whether by deed or cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted ito the Union as states upon an equal footing with the original states in all respects."

Shively vs. Bowlby, 132 U. S., 49.

The last quotation, although referring to the political divisions known as territories, necessarily involves a recognition of the trust which we are discussing, and of occupation and settlement of the public domain within the territories, without which the object of admission into the Union as states could, by no possibility, be effected.

> "In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain title to such lands had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons, at prices below their actual value."
>
> United States vs. Trinidad Coal Co., 137 U. S., 160.
>
> See also Pollard, Lessee, vs. Hogan, supra.

This inquiry as to constitutional authority to establish and preserve forest reserves presents one aspect of the question concerning the reclamation of arid lands which was considered in the case of Kansas vs. Colorado, *supra*. The court there said:

> "At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the Legislature of the state in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But if no such power is granted, none can be exercised."

So here, when the Constitution was adopted, the energies of the country were largely devoted to clearing the land of trees, and no one then supposed that the time would come when the preservation of great forests would be regarded as necessary, much less that it would be considered a governmental function. Consequently, it is useless for us to look for a grant of power which may be supposed intentionally to include the authority now under discussion.

It should be observed that national authority to reclaim arid lands may be sustained, if at all, on the broad ground that their reclamation is an aid in disposing of them, which is the purpose for which they are held. Reservations, on the contrary, are in effect an abandonment of the purpose of disposing of the lands included therein.

That the power to establish these reserves may be highly desirable, and that it can be more effectually exercised by the federal government than by the states, need not be denied—though the latter proposition is not here admitted—yet, that affords no ground for asserting the existence of the power. As was pointed out in the case last cited, this is a government of enumerated powers, and the doctrine of inherent powers, which has in recent years been revived by men high in authority, finds no support in the rulings of this court.

No grant of power having been made, if it exists, it is by implication. But it cannot be implied without conflict with the principles laid down by this tribunal.

To withdraw these vast tracts from settlement and devote them to profit-making for the government is to violate the trust under which they are held. It has never been supposed that public lands are to be treated as property of the government from which profit is to be made. All the people of the country are beneficiaries of the trust because all have equal right to acquire land upon the liberal terms prescribed, and all share in the general benefits to the nation resulting from the settlement and use of the lands. These benefits, however, are not to reach the people through the treasury of the United States by

a decrease in taxation due to increase in the government's income. Nor are they to come from cheaper lumber or power for manufacturing. They come to us as a nation primarily through increase in the strength of the nation in the way contemplated by the trust—the other advantages being merely incidental.

To dispose of land for this purpose of strengthening and extending the nation is as truly a governmental function as to hold it for forts, arsenals or navy yards. It causes no conflict with the rights of states, results in no system of governmental landlordism, and places no part of the country under the rule of departmental bureaus hundreds of miles distant. It is a system wrought out by a long line of statesmen, approved by the courts, sanctioned by usage, and thoroughly American.

Not only does the system of national forest reserves violate the trust concerning public land, but it denies to the states in which such reserves are established the equality with other states to which they are entitled.

This is not a mere re-statement of the proposition hitherto discussed. The rights of the states concerned are violated in repects other than those mentioned. One of these rights is to have public lands open to settlement and improvement, as they were in the older states which contained such lands. The withdrawal of lands from entry checks the growth of the state, retards its increase in wealth and narrows the basis of taxation. Other states were left free to develop through the settlement of public lands within their borders—the settlers having free pasturage upon such lands and timber therefrom for

their necessities—until the entire area of lands having any value became private property—a source of benefit to the whole state, and of direct revenue to its treasury.

Every state, when admitted into the Union, was entitled to enjoy these advantages and means of development, the furtherance of which was the purpose of the trust in question. To withdraw large bodies of land is to deprive a state of these advantages and to deny to it this constitutional equality with other states.

This view of the question has more than an academic interest. With one-fifth of its area withdrawn from development and permanently exempt from taxation, the state of Colorado has been curtailed of its right to develop and secure increase of revenue. Its citizens residing on the borders of these reserves see their hopes of enlarged facilities for business, education and social intercourse thwarted, and the right, elsewhere freely enjoyed, of making use of the natural resources of the country, denied.

Where, then, can be found the unquestioned and unquestionable grant of power which overcomes these manifest objections?

In the language of the Report of the House Judiciary Committee to the Sixtieth Congress (Report 1541), denying the right of the government to purchase land for forest reserves, "an express power must first be found which can be executed by the acquisition" (in this case the reservation) "of lands for forestry purposes."

What is the legitimate end, within the scope of the Constitution, which is to be subserved by this system of reserves?

The proposition, as generally stated, is to conserve the national resources; that is, to provide for a continuing supply of timber, regulate the flow of streams and preserve power sites from being monopolized (30 Stat. L., 34).

It will hardly be contended that this subject is within the scope of the general welfare clause of the Constitution, since it is agreed that the authority granted "to provide for the common defense and general welfare" is confined to taxation for the purposes mentioned. The clause does not grant to Congress a general power to legislate for the common welfare, or in any way extend its powers.

Story on the Const., sections 907-908.
Tucker's Const. of United States, section 222.

But, if the power in question exists, can it be exercised without the consent of the states directly affected?

Our system of government knows no such thing as a divided territorial sovereignty. In the District of Columbia, the territories, and those places which have been purchased for arsenals, forts, etc., with the consent of the state, the federal government has exclusive jurisdiction. In the rest of the country, as to all local affairs, the states are sovereign.

The first paragraph of the section now under consideration requires the consent of the states concerned as a condition to the forming of new states within the jurisdiction of other states, or from two or more states or parts of states. Yet, if the appellee's contention is well founded, there may be set up within a state, and without its consent, what is in effect a territory.

The total of forest reserves in Colorado is equal to the area of the states of Connecticut, New Hampshire and Massachusetts. If this great tract is withdrawn from the operation of state laws, if any government at all exists thereon, it must be by virtue of national sovereignty, and, hence, it amounts to a Federal Territory.

This, alone, shows that the contention cannot be sustained.

The avowed purposes of creating these reserves do not fall within a constitutional grant, and are better promoted by the states, which have undoubted authority in the premises. Each state ought to be permitted for itself to determine—subject to the right of Congress to dispose of public lands—how the natural resources within its borders shall be used.

It has been well said that men are worth more than trees, and the best products of a nation like ours are men who have the courage, strength and skill to carve homes out of the wilderness and make the desert to blossom as a rose. No nation of mere tenants ever became a free people. It is of infinitely more importance to us that the public lands become the homes of liberty-loving citizens than that the supply of timber for unborn generations should be conserved, or that the national revenues be increased by a few paltry millions.

To this court is committed the high duty of determining what are the constitutional relations between the states and the nation. In so doing, it has always acted, not as the agent of the federal government to expand its authority or aid it in acquiring new powers, but rather as an arbiter, without interest or bias, by judicial determination to maintain unim-

paired the rights granted to each by the great charter of government constructed by the fathers.

In the discharge of this duty, doubtless the court will at all times bear in mind the declaration which it has itself made, that:

> "State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions."

And that:

> "Unrest, disquiet and disturbance will always arise among a people jealous of their rights, from the exercise by the general government of powers they have reserved to themselves or to the states."

It is respectfully submitted that the decree of the Circuit Court is wrong and should be reversed.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

FRED LIGHT, Appellant,
v.
THE UNITED STATES. } No. 360.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was brought to put a stop to repeated and continuing trespasses by appellant's stock within the limits of the Holy Cross Forest in Colorado. The appellant admitted that he had not complied with, and did not intend in the future to comply with, the regulations of the Secretary of Agriculture, which, in the absence of an express written permit, prohibited such intrusions (rec., 13, 14, 264, fol. 473); but relied upon the State "fence law," which, after defining what shall constitute a "lawful fence," provides as follows:

> Any person making and maintaining in good repair around his or her inclosure, any

> fence such as described in section one of this act, may recover in a suit for trespass, before any court having competent jurisdiction, from the owner of any animal or animals which break through any such fence, in full for all damages sustained on account of such trespass, together with costs of suit; and the animal or animals so trespassing may be taken and held for security for the payment of such damages and costs; and no person or persons shall be allowed to recover damages for any injury to any crops or grass or garden products, or other vegetable products, unless the same, at the time of such trespass or injury, was inclosed by a legal and sufficient fence, as before described. (Laws, 1885, p. 221, sec. 3; Rev. St., 1908, sec. 2589.)

It is conceded that the reserve was not fenced.

The Government tried its case upon the theories, first, that by turning out his cattle from his ranch, under such circumstances that many of them naturally and inevitably would enter and remain within the reserve, the defendant was pursuing a practice which, in law, was tantamount to driving them there directly—a practice which the fence law itself does not countenance; second, that the fence law should be construed as fixing a standard of diligence to govern actions for damages between individuals, and should not be construed as intended to apply either to the State or the United States; and, third, that, if so intended, its attempted application to the United States would be ineffectual.

Nearly all of the evidence contained in the record has relation to the first of these propositions. The testimony of the Government's witnesses went to show that the conditions as to food and water about the appellant's ranch, where he turned out his stock each spring, were such that the stock could not find sustenance there through the grazing season, but, aided by topographical conditions, and by well-defined cattle trails leading directly from the ranch to the reservation, would, without fail, seek the abundant and superior grasses and water supply which the reservation afforded. This testimony was strongly contradicted by witnesses called for the defense.

Upon demurrer (rec., 9) and again on final hearing (rec., 292) the case went against the appellant. The decree (rec., 292) was general; and neither there, nor elsewhere in the record, is there any indication of how the lower court decided the issue of fact or upon which of the legal propositions involved it rested its conclusions.

The State of Colorado was not, and is not, a party to the suit, though the appellant is represented by its attorney general.

For the convenience of the court, the statutory provisions concerning the creation, purposes, and administration of forest reservations, and the regulations concerning live stock, are set forth in an appendix to the brief.

APPELLANT'S ARGUMENT.

The appellant's argument admits or assumes the truth of the following propositions:

(1) That if the prohibitory regulations complained of could lawfully have been made by Congress directly, then Congress committed no legal impropriety in empowering the Secretary of Agriculture to make them as its agent. In other words, no doubt is expressed on the score of delegated "legislative" power. This concession is deemed entirely sound.

In re Kollock, 165 U. S., 526, 533, 536.
Buttfield v. *Stranahan*, 192 U. S., 470, 492.
Union Bridge Co. v. *United States*, 204 U. S., 364.
Act of June 4, 1897, 30 Stat., 34; act of Feb. 1, 1905, 33 Stat., 628, section 5.

(2) That the regulations followed the authority which Congress intended to confer.

Shannon v. *United States*, 160 Fed., 870.
Dastervignes v. *United States*, 122 Fed., 30, 34.

From these premises appellant draws the conclusion that the regulations are to be regarded as tantamount to acts of Congress for the purpose of invoking the Constitution against them in favor of the State fence law with which he supposes them to be in conflict, and upon the hypothesis that in enforcing the regulations the court below necessarily acted at the expense of that law, this court is invited to take jurisdiction. The theory of the appellant here, though somewhat obscure, appears to involve the following propositions: That the State law should have been held su-

perior, (*a*) because the United States, as property owner, is subject to regulation by the State in the same measure as any private owner, and (*b*) because the municipal jurisdiction of the State extends throughout the reservation, and (*c*) because the acts of Congress which purported to authorize the making and management of the reservation, the act of the President in setting it aside, and the entire collection of rules and regulations adopted by the Secretary of Agriculture, are all and singular null and void, as infringements upon the sovereignty of the State of Colorado and as ill comporting with her sovereign equality in the sisterhood of States. Proposition (*a*) is of course denied by the Government. Of the truth of (*b*) there can be no doubt whatever; in his use of it, however, appellant merely begs the real question, which concerns not the *locus* of State jurisdiction but the subjects upon which it may operate; (*c*) is apparently founded in part upon the false assumption that (*b*) would be denied if (*c*) were not admitted, and in part, but quite vaguely, upon the idea that there is such a degree of injustice to the State in withholding from private acquisition and State taxation the large areas comprised in this and other reservations as actually to amount to a reduction of her sovereignty below the par of other States in which the public lands were more liberally granted away.

ARGUMENT FOR THE UNITED STATES.

The following propositions will be advanced:

I. It may be doubtful whether this court has jurisdiction of the appeal. The question of the

validity of forest reservations is one which the appellant has no standing to raise. The assertion of the competency of the State fence law to control the United States in the protection and in regulating the use of its property can hardly be said to present a constitutional question.

II. The fence law merely prescribes a rule of diligence to govern the relations of private landowners and cattle owners, by regulation of the remedies of the former against the latter. It was not intended to govern the relations of individuals to the Government and is incapable of being so construed.

III. Congress was duly empowered by the Constitution to protect the reservation from trespasses, to declare and regulate the uses to which it might be put, and to adopt regulations appropriate to those ends. Such were the regulations involved in this case. They were part of the supreme law of the land. The duty of the appellant to obey them and of the courts to enforce them was entirely independent of State laws.

I.

Has the court jurisdiction?

The appellant relies upon two propositions: (1) That the regulations were void because Congress had no power to create the reservation and carry out the forest-reserve policy within the State; (2) that, assuming (1) to be unsound, the regulations were none the less void, since Congress had no power to override the State fence law.

(1) The appellant has no standing to attack the reservation or the forest-reserve policy.

(*a*) He does not claim any right or interest in any of the lands reserved. Before the reservation he doubtless enjoyed a license of pasturage there. But this mere privilege, existing by the tacit acquiescence of the Government in respect of public lands "where they are left open and uninclosed and *no act of Government forbids this use,*" (*Buford* v. *Houtz*, 133 U. S., 320, 326; *Richards* v. *Sanderson*, 39 Colo., 270, 274), was unquestionably a privilege which the Government could take away. (*Shannon* v. *United States*, 160 Fed., 870, 873; *Frisbie* v. *Whitney*, 9 Wall., 187; *Yosemite Valley Case*, 15 Wall., 77.)

(*b*) The constitutionality of the reservation is attacked solely upon the ground of its supposed invasion of the rights and prerogatives of the State. But the State is not here objecting, and its supposed injury is no concern of the appellant.

Bacon v. *Walker*, 204 U. S., 311, 315.
Hatch v. *Reardon*, 204 U. S., 152, 160.
Budzisz v. *Illinois Steel Co.*, 170 U. S., 41.
Supervisors v. *Stanley*, 105 U. S., 305, 311.
Clark v. *Kansas City*, 176 U. S., 114, 118.
Lampasas v. *Bell*, 180 U. S., 276, 283, 284.
Cronin v. *Adams*, 192 U. S., 108, 114.

Budzisz v. *Steel Co.* was an action of ejectment in which the plaintiff in error as defendant below claimed that the entries and patents relied on by his opponent were void, upon the ground that at the times when they were made and issued the lands

were not subject to entry under the laws of the United States, being withheld by the stipulations of certain Indian treaties.

In dismissing the writ of error this court said (p. 44):

> Mere allegations to that effect, not based upon the facts of the case, do not create a case which we are authorized to review. The alleged invalidity of the entries and of the patents did not arise out of any alleged misconstruction or breach of any treaty, but out of the alleged misconduct of the officers of the Land Office in permitting the entries and in issuing the patents; and if any error was committed by the Circuit Court in dealing with that question, which we do not intimate, the proper course for the defendants was to have gone to the Circuit Court of Appeals.
>
> Moreover, the defendants did not connect themselves in any way with the Indian treaties, or with any of the parties to them; nor did they claim any rights under said treaties, or under any of the parties to them. In no true sense, therefore, can it be said that this is a case in which the validity or construction of any treaty made under the authority of the United States is drawn in question by a party having a rightful interest in such question.

In *Hatch* v. *Reardon* (204 U. S., at p. 160) it was said:

> But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless

> the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. (*Supervisors* v. *Stanley*, 105 U. S., 305, 311; *Clark* v. *Kansas City*, 176 U. S., 114, 118; *Lampasas* v. *Bell*, 180 U. S., 276, 283, 284; *Cronin* v. *Adams*, 192 U. S., 108, 114.) If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the State court may read into general words, or how far it may sustain an act that partially fails.

Lampasas v. *Bell* (180 U. S., 276) was a suit against the city of Lampasas upon certain bonds. The defendant in its answer set up, as a constitutional objection to the bonds, that the residents of a certain portion of the incorporated territory had been given no opportunity to be heard as to whether they should be included within the municipality and subjected to its power of taxation. Upon this ground it contended that the bonds were void under the fourteenth amendment. This court dismissed the writ for want of jurisdiction, observing (pp. 283, 284):

> But what concern is it of the plaintiff in error whether the residents of such territory were or were not given an opportunity to be

heard? It had no proprietary right or interest in "territory proposed to be incorporated;" *it* was put to no hazard of taxation without a hearing, nor can it stand in judgment for those who had such interest or were put to such hazard.

* * * * *

We said in *Clark* v. *Kansas City* (176 U. S., 114) (quoting from Cooley's Constitutional Limitations, sec. 196) that "a court will not listen to an objection made to the constitutionality of an act by a party whose right it does not affect, and who has therefore no interest in defeating it"—that is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. "To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose." (Wellington, petitioner, 16 Pick., 87, 96.)

It follows necessarily that the plaintiff in error has no legal interest in the constitutional question which it raised and upon which it claims the right to come directly to this court from the Circuit Court under section 5 of the act of 1891, *supra*. To permit it to come here directly from the Circuit Court would make a precedent which would lead to the destruction of the statute.

(*c*) Appellant's defense rests upon the claim that immunity from this prosecution is conferred by the

State fence law. If that immunity exists, it is not necessary to destroy the reservation and shatter the entire forest-reserve system in order to sustain it.

(2) As for the second proposition, viz: That the State law rendered Congress impotent to enact a legislative prohibition against trespassing on the reservation, there is grave doubt, to say the least, whether it suffices as a basis of jurisdiction.

(*a*) It can not be said with accuracy that the law was "*claimed* to be in contravention of the Constitution of the United States." Here was a general statute dealing with the rights of "persons" to recover damages in the State courts, and enacted years before the obnoxious regulations were ever thought of. It would be quite illogical to argue that such a law, though entirely innocent when enacted, became suddenly violative of the National Constitution through the action of the Secretary of Agriculture in adopting a set of regulations. Under the circumstances, if the regulations were upheld as a valid exercise of constitutional power, the only rational view of the State law was that, being general and not in terms applicable to the United States, it could not have been designed to extend to the matter with which the regulations dealt. The Government did not *claim*, in the pleadings or elsewhere, that the State law was unconstitutional; and there is no evidence whatever in the record that the court below so held. The clear inference is that it did not do so.

(*b*) Was "the constitutionality of any law of the United States * * * *drawn in question*," or "the

construction or application of the Constitution" *involved*? The Government contended that the regulations were a valid exercise of power by Congress. The appellant contended that they were not—because in conflict with the fence law. This branch of his argument assumes that prohibitory regulations would have been valid if the State had not made a conflicting rule. It is all important therefore that the assertion of such a conflict should rest upon a reasonable construction of the State law. Appellant proposes a construction which would produce the conflict; but is that construction even colorably supported by the law itself?

(*c*) If the lower court regarded the State law as not aimed at the Government, *eo instante* all reason and all propriety in passing upon its constitutionality vanished from the case. The record affords no support to the assumption that the constitutional question was even considered, unless that assumption be in turn based upon another, namely, that the court construed the statute as, by intention, applicable to the United States, which latter assumption must either be made without reference to whether such construction was right or wrong, or upon a finding by this court that it was correct, and a third assumption that the conclusion below must have been the same.

(*d*) This court has often decided (as will hereinafter be shown) that the control of the Government over the uses of its property, as over every other national subject, is immune from State interference.

This case scarcely calls for another decision to that effect. (*Rakes* v. *United States*, 212 U. S., 55, 58.)

II.

State fence law not intended to apply to the United States.

(1) This, like all similar laws (and whether they rest on statute or custom seems immaterial), is essentially a law which, analogous to the statutes of limitations, operates upon the remedy. Conceding the landowner's exclusive right of possession, and conceding also that the right is violated by any intrusion of live stock without his permission, the law nevertheless denies him a remedy, unless it appear that the trespass was one against which his own reasonable diligence could not have guarded. And the law itself declares what shall be the test of reasonable diligence, viz, the maintenance of a fence of specified efficiency. The law confers no right whatever upon the cattle owner. It gives him no permission to place his cattle upon the land of another, whether fenced or unfenced. It merely vouchsafes him a reasonable assurance of immunity from what, under the common law, would be the legal consequences of their trespassing, provided this shall have resulted from their straying and not directly from any act and purpose of his own. Or to put the explanation on a slightly different basis: Whilst the common law exacted absolute diligence from the stock owner and none from the landowner this law apportions the diligence, so to speak; for the landowner, if he would

protect his possession must either police his property or surround it with the statutory fence, and the stock owner, if he would escape liability must guard all "breachy" animals against whose assaults such a fence would prove an insufficient barrier. Such laws formerly obtained in practically all of the States; they may, of course, be repealed at any time by the State legislatures, and they have uniformly given way in the more thickly settled parts of the country with the increase of population and advance in agricultural development. (For a full discussion of this subject see *Buford* v. *Houtz*, 133 U. S., 320.)

In *Lazarus* v. *Phelps* (152 U. S., 81) this court, in construing such a statute of Texas, expressly held that it afforded no defense to one who put his cattle in such circumstances that they were bound to commit the trespass. It said (p. 85):

> The object of the statute above cited is manifest. As there are, or were, in the State of Texas, as well as in the newer States of the West generally, vast areas of land over which, so long as the Government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorize cattle owners deliberately to take

possession of such lands and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, *or rather condoned*, was an accidental trespass caused by straying cattle.

See, also:

Sabine, etc., Ry. v. *Johnson*, 65 Tex., 389, 393.
Delaney v. *Errickson*, 11 Nebr., 533, 534.
Otis v. *Morgan*, 61 Iowa, 712.

In *Moore* v. *Cannon* (24 Mont., 316, 324) the court said of such a statute:

It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle. If, for example, a cattle owner, knowing that the proprietor of certain lands had been in the habit of leasing his lands for pasturage, should deliberately drive his cattle upon such lands in order that they might feed there, it would scarcely be claimed that he would not be bound to pay a reasonable rental. So, if he lease a section of land adjoining an uninclosed section of another and

> stock his own section with a greater number of cattle than it could properly support, so that in order to obtain the proper amount of grass they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance.

The case of *St. Louis Cattle Co.* v. *Vaught* (1 Tex. Civ. App., 388) was an action brought to recover damages for a trespass upon certain lands inclosed under one fence with lands belonging to the owner of the cattle. In passing upon the question the court said (p. 390):

> In this State, on account of the condition which has existed from time immemorial of the grazing lands, the owner of such property can not complain as long as it remains a portion of the "commons," that the cattle of another should roam over it and graze upon it at will. (*Davis* v. *Davis*, 70 Tex., 123; *Buford* v. *Houtz*, 133 U. S., 320.) This doctrine, however, does not authorize the owner of cattle, by affirmative conduct on its part, to appropriate the use of such lands to his own benefit. He will not be permitted thus to ignore the truth that everyone is entitled to the exclusive enjoyment of his own property. In this case the appellant, by means of fences constructed or maintained by it, inclosed the land of the appellee in such manner as to reap from it those benefits which, as a rule, are incident exclusively to ownership. The use and enjoyment of the property under such circumstances imports necessarily the idea of liability.

In passing upon a similar statute, the Supreme Court of Kansas in *Larkin* v. *Taylor* (5 Kans., 433) said on page 446:

> It is not to protect a wanton trespasser, or a man who shows rather an intention to injure his neighbor, than to enjoy the benefits the law allows him. Such conduct would not be negligence or carelessness in the ordinary acceptation of those terms. It would not be a mere heedless inattention, but a willful or wanton trespass not intended to be protected by our fence laws. But when the plaintiff in a case abundantly shows a want of care which the law requires on his part, he can not recover from a defendant chargeable only with a like want of care. He must show that the defendant's negligence was so gross as to amount to a willful or malicious want of care, to entitle him to recover, and the law should be so explained to the jury.

In the case of *U. P. R. Co.* v. *Rollins* (5 Kans., 167) the court, on page 176, said:

> There is no statute that expressly authorizes cattle to run at large anywhere, and there is no statute, as we think, that either expressly or impliedly authorizes them to run at large upon other people's land, the property of private individuals. It is true that the fence laws, stray laws, and the laws regulating the running at large of stock, already referred to, impliedly authorize cattle to run at large; but it can not be supposed that the legislature thereby intended to authorize them to run at

large on the private property of individuals. The legislature can not dispose of private property in that way. Private property can be taken by the legislature for *public use* only, and that after *just* compensation has been made for the same to the owner thereof. The legislature, by these acts, simply authorized cattle to run at large upon such *public* lands as they had a right to dispose of in that way. These statutes, referred to, specify what shall be lawful fences, modify the common law in some respects as to the damages that shall be recovered, and the remedies that must be resorted to with respect to trespassing animals, and in some cases prohibit stock from running at large, and in other cases impliedly permit them to do so, and have probably so modified the common law that no action lies for injuries done on real estate by trespassing cattle unless such real estate is inclosed with a lawful fence.

The owner of real estate does not use reasonable and ordinary care and diligence to protect his property from the intrusion of roaming cattle unless he incloses it with a lawful fence. And if he receives any injury through the want of such lawful fence, he is in about the same condition as though he received injury in any other way through his own negligence. He is like the man who has not used the proper diligence to collect a promissory note, but has allowed the statute of limitations to run against it and bar its recovery. He is without a remedy. But because he is without a remedy—because he has forfeited his remedy by his own negligence, he has not thereby lifted up the wrongs

> and trespasses of others upon his own rights, to be moral virtues, or legal rights to be protected and encouraged by law, as seems to be supposed by the plaintiffs below in this case.

(2) It has also been expressly held by the highest court of Colorado that the willful and deliberate driving of cattle upon the premises of another is actionable. In *Nuckolls* v. *Gaut* (12 Colo., 361) an action for trespass by the landowner against the cattle owner, in which the plaintiff prevailed below, the court said (p. 362):

> Not having the evidence before us, we must presume that it was sufficient, under the law as pronounced by the court, to warrant the jury in returning the verdict they did. Defendant in error may, for aught we know, have had a good and sufficient fence, or the evidence may have shown that plaintiff in error willfully and deliberately drove his cattle upon the premises of defendant in error for the purpose of inflicting the resulting injury. The judgment is affirmed.

See, also:

> *Norton* v. *Young,* 6 Colo. App., 187.
> *Fugate* v. *Smith,* 4 Id., 201, 203.
> *Sweetman* v. *Cooper et al.,* 20 Id., 5; 76 Pac., 925.

(3) As the essential purpose of the law is to make the enforcement of a property right dependent upon the exercise of diligence, its application to the state is precluded upon the same principle and for the same reasons which operate to except it from stat-

utes of limitation and the doctrine of laches and prescription.

Suppose that the State of Colorado, out of a desire to improve the grazing upon its own lands, were expressly to revoke any license of pasturage that may be assumed to exist in respect of those lands—or, to put the case more strongly, suppose that a public park, adorned with lawns and flower gardens, or a State experimental farm, with fields of grain and other crops, were created by State authority—would the individual stock owner be under no duty to prevent his animals from injuring or destroying this public property and thwarting the public plan by their repeated tresspasses? Would it suffice for him to say that the State legislature, or its officials or employees, had not been diligent in providing a "statutory" fence? Rather should it be held that the individual rested under an obligation to assist in the protection of the public property, at least to the extent of saving it from the injurious influences under his own control. If this statement be not true, then the keepers of the supposed park or farm would be powerless to drive invading animals a foot beyond the boundary without becoming themselevs lawbreakers and subject to an action for damages—and this even though it were shown that the owner knew in advance that the animals would probably commit the trespass. (*Richards* v. *Sanderson*, 39 Colo., 278.)

(4) Now, even if it were possible to admit that the United States as a property owner is subject to the

same control by the State as individuals are, must it be conceded also, that to the mind of the State legislature the character and functions of the Nation are lost in the general conception of ownership? Should not even the most ardent advocate of this ~~statutory~~ startling theory be forced on his part to the admission that, as the power is most delicate and extraordinary, so the legislative intention to employ it can never be derived from general laws purporting to define the relations or regulate the legal remedies of mere "persons"? For reasons sufficiently obvious, the search for an authority expressly declaring this suggested rule of construction has not been successful.

III.

The regulations were a valid exercise of constitutional power. It was the duty of the individual to obey them and of the courts to enforce them without regard to State laws.

(1) Before proceeding further, it may be well to clear away certain misunderstandings which pervade the opposing brief.

(*a*) *The power to create and administer the reservation is not properly in question.*

The appellant had no interest in the lands before they were reserved, nor any right to go upon them, other than the implied license of pasturage, which was clearly revocable by Congress at any time and the legal effect of which was no more than to render lawful what would otherwise have been a trespass. The sum of the supposed congressional offending is

in laying upon him a positive duty to prevent his stock from crossing the reservation line. If Congress had no right to impose such a duty, the appellant's grievance would be entirely satisfied by a decision simply to that effect. If Congress had that right, the offensiveness of the reservation to the assumed rights and prerogatives of the State is, so to speak, *res inter alios*—no concern of the appellant's, who does not represent the State and has himself been subjected to no legal injury. The utter lack of relation upon the part of the appellant to this supposed constitutional question is palpably apparent when it is considered that were the appellant's cattle forcibly excluded by the Government, he would have confessedly no ground to complain, although the reservation would persist and its administration would go on in all other respects substantially unchanged. This subject has been fully discussed *supra*.

(*b*) *The municipal sovereignty of the State within the reservation is not in question.*

No one for the Government has contended that the municipal jurisdiction of the State flowed any the less freely over the territory affected after the reservation was effected than before. The State has ceded no such jurisdiction to the United States and the United States reserved none at the time of her admission to the Union. Article 1, section 8, of the Constitution is inapplicable. Over the reservation as a *locus* the jurisdiction of the State, including the police power, is the same as elsewhere within her

boundaries. The incapacity of the State law to accomplish what the appellant desires of it in this case is due not to any curtailment of State sovereignty within the reservation, but to the impotence of State laws anywhere to deprive the United States of control over its own property or to interfere in its management of this subject of purely Federal concern. The circumstance that the Federal subject here involved is land probably is responsible for this peculiar misconception in appellant's brief, which would not have existed if the case had concerned the control or use or protection of personal property belonging to the United States. The Federal property, considered as such, whatever be its nature or location, is simply detached from the subject-matter upon which the State laws may operate. Considered again *as property*, it is as remote from the State's jurisdiction as though it were removed entirely beyond her territorial confines—except as Congress may properly be held, expressly or impliedly, to have assented to a different relation.

> We take it to be a point settled beyond all contradiction or question that a State has jurisdiction of all persons or things within its territory which do not belong to some other jurisdiction, as the representatives of foreign Governments, with their houses and effects, and property belonging to or in the use of the Government of the United States. (*Coe* v. *Errol*, 116 U. S., 517, 524; *Van Brocklin* v. *Tennessee*, 117 U. S., 151, 179.)

> All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual States, in every respect, and for every purpose, including that of taxation. (*McCulloch* v. *Maryland*, 4 Wheat., 316, 395.)

Indeed, the provision of law quoted on page 29 of appellant's brief is enough in itself to dispel any doubt concerning the harmony of the forestry legislation with all proper claims of State sovereignty, for nothing could be more plainly declaratory of the purpose of Congress to avoid even seeming interference with the legitimate powers of the State over persons and things within such reservations.

(c) *The State has no beneficial right whatsoever in the land; there is neither community of ownership, nor relation of trustee and cestui que trust.*

Elaboration here seems hardly necessary. The lands were ceded to the United States by Mexico by the treaty of Guadaloupe Hidalgo nearly 30 years before the State of Colorado came into being. It may be that, as this court has suggested, the territory was held with the purpose of converting it into a theater for State governments. There may have been some measure of obligation to do so; but surely no more than a moral obligation with no other obligee than the spirit of the Constitution, or the then existing States—an obligation to be performed at such times and in such manner as the judgment and discretion of Congress should determine and whose performance could never be exacted save by the congressional

conscience. Whatever its nature, suffice to say that this obligation was actually complied with long ago, so far as were concerned the lands within the State of Colorado. Hence the references to it in appellant's argument are irrelevant and the reliance futile.

But this court does not say, as might be concluded from the opposing brief, that there was ever even a moral obligation to dispose of the *title to these lands* at any particular time or in any particular way, or any moral obligation to submit them to the taxation or the regulation of the particular State wherein they lie, or to allow such State in any manner to share in their enjoyment or control; much less an obligation of a justiciable nature, the performance of which, contrary to the will of Congress, might be directly or indirectly enforced by the courts.

These lands are held by the United States in trust, to be sure. The Nation holds *all* of its property, real or personal, in that way.

> The United States do not and can not hold property, as a monarch may, for private and personal purposes. All the property and revenues of the United States must be applied and held, as all taxes, duties, imposts, and excises must be laid and collected, "to pay the debts and provide for the common defense and general welfare of the United States." (*Dobbins* v. *Commissioners*, 16 Pet., 435, 448; *Van Brocklin* v. *Tennessee*, 117 U. S., p. 158.)

But the people of the United States—not particular States nor the people of particular States—are the beneficiaries.

> The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and, under certain circumstances [referring to equitable claims of entrymen to receive patents under general land laws] to invest the individual citizen with the sole possession of the title which had till then been common to *all the people* as the beneficiaries of the trust. (*United States* v. *Beebe*, 127 U. S., 338, 342.)
>
> NOTE.—Through the carelessness of some printer the learned counsel for the appellant are placed in the false position of adapting and converting the above passage to their own use by changing the word "citizen" to the word "States." (Brief, p. 31.)

In *United States* v. *Trinidad Coal & Coke Company* (137 U. S., 160) the court said, speaking of coal lands within the State of Colorado (p. 170):

> They were held in trust for all the people; and, in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value.

It was perfectly understood at the beginning of the Government that the lands of the original public

domain, ceded by Virginia, and four other States during the Confederacy, and by Georgia and North Carolina soon after the new Government had begun its existence, were ceded and held to effect immediate union, to forestall future controversy and dispute, to discharge the obligations and expenses of the common war, and to meet the common financial burdens of the future. The terms of the treaties, and the causes, negotiations, and proceedings out of which they eventuated, admitted of no reasonable doubt upon the subject; and yet, afterwards, when new States were created out of this territory, there were not lacking those who advanced the extraordinary, if not preposterous, claim that the States by virtue of their nascent sovereignties, and in face of solemn compacts to the contrary which conditioned their birth, had acquired the very ownership of all the public lands within their borders. The claim was fittingly answered by Mr. Justice McLean in 1839 in *United States* v. *Gratiot* (1 McLean, 454, 26 Fed. Cas., 15, 249), where, after referring to a contention that Congress could not lease a lead mine, he said:

> A doctrine somewhat similar to this was at one time advanced, with some prospect of embodying in its favor a strong public feeling. It was, indeed, not only asserted that the laws of the United States which regulated the sale of public lands within a State were void, but that the lands rightfully belonged to the State. This doctrine was well calculated to enlist in its behalf local feelings and interests; but the

> sober sense of public sentiment gave little encouragement to so novel and dangerous an error.

And in *Turner* v. *American Baptist Union* (5 McLean, 344; 24 Fed. Cas. No. 14251), decided in 1852, the court said:

> On the part of complainant it was contended that on the establishment of the State government, Michigan, by virtue of her sovereignty, had a right to all the lands within her limits. This argument is not now advanced for the first time. Several years ago it was broached in the Senate, and in some of the State legislatures, but it was received everywhere with less favor than its advocates anticipated. It proffered so rich a boon to the new States, it was expected that they would embrace it with enthusiasm and hail its advocates as the distinguished friends of State rights. The argument grew less cogent by the lapse of time, as the public lands passed into the hands of individuals, by purchase. Had it not been for this, no one can say that the policy would not have enlisted a powerful, if not successful, party in our political progress. Looking at the matter as a question of law, we have no hesitancy in saying the argument is groundless.

See also:

> *Van Brocklin* v. *Tennessee*, 117 U. S., 151, 159 et seq.
>
> For the history and terms of the original sessions, see Public Domain, pp. 59–88.
>
> Treat's National Land System (N. Y., Treat & Co., 1910).

The well-established doctrine that tide lands and the shores of navigable waters generally below high-water mark pass, without express grants, to new States upon their admission as such (*Van Brocklin* v. *Tennessee*, 117 U. S., 151, 167, 168; *Pollard* v. *Hagan et al.*, 3 How., 212, as modified by *Shively* v. *Bowlby*, 152 U. S., 1, 27, 47, and *Mann* v. *Tacoma Land Company*, 153 U. S., 273; *Barney* v. *Keokuk*, 94 U. S., 324, 338) is a special doctrine, resting upon the fact that the ownership and control of such lands was an inherited sovereign prerogative of the original States and upon the (moral?) obligation, and the strongly presumed intention, of Congress to convey to new States all lands of that character within their boundaries. It has no significance where ordinary lands are concerned. To say that the tenure by a State of all the lands, or any particular proportion or quantity of the lands, comprising its territory is essential to its full sovereignty would be, of course, absurd, and to object on the same ground to the tenure of land by the United States seems hardly less so. If the argument which the appellant makes in this connection be sound, Rhode Island may justly complain of the size of Colorado. (Br., pp. 35–38.)

The lands here in question were acquired and paid for by the money and sacrifices of the Nation. Colorado, like other States, received liberal donations of land from the Federal Government when admitted to the Union (18 Stat., 474). (She receives regularly a large percentage of the yearly revenue from the national forests within her borders, 35 Stat.,

260. See appendix.) And, like all other States carved out of the public domain, with a very few exceptions (117 U. S., p. 160 et seq.), she solemnly agreed never to tax or lay claim to any of the lands of the United States.

The enabling act (referring to the convention which was to, and subsequently did, frame the State constitution), provided:

> That said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State, * * * secondly, that the people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said State shall never be taxed higher than the lands belonging to residents thereof, and that no taxes shall be imposed by the State on lands or property therein belonging to, or which may hereafter be purchased by, the United States. (18 Stat., 474, sec. 4.)

An ordinance in the very words of this proviso was accordingly adopted with this addition:

> Third. That this ordinance shall be irrevocable without the consent of the United States and the people of the State of Colorado. (1 Mills Ann. Stat. Colo., p. 109.)

Adoption of this ordinance, like compliance with all other provisions of the act, conditioned the power

of the President to proclaim the State's admission. (18 Stat., 474, sec. 5.) The proclamation recited the passage of the ordinance and found that the "fundamental conditions imposed by Congress," of which that was one, had been complied with.

1 Mills Ann. Stat. Colo., p. 111;
19 Stats., 665.

The ordinance, however, was not necessary to protect the United States from all claim of State interest in the lands.

> It can not be doubted that the provisions which speak of the exemption of property of the United States from taxation, in the various acts of Congress admitting States into the Union, are equivalent to each other; and that, like the other provision, which often accompanies them, that the State "shall not interfere with the primary disposal of the soil by the United States," they are but declaratory, and confer no new right or power. (*Van Brocklin* v. *Tennessee*, 117 U. S. at p. 167.)

In *Hartman* v. *Tresise* (36 Colo., 146), wherein a statute purporting to authorize the public to fish in all streams of the State, subject to actions of trespass for damage done to riparian property, was declared void, the court said (p. 150):

> If the state, when formed, might have exercised authority in disposing of the public domain therein situate, it was relinquished, for, in our enabling act, 1 Mills' Ann. Stats., pp. 90, 91, 109, it was specifically provided, as one of the conditions precedent to the right

> of the people of our territory to form a state, that they should, and complying therewith they did, by irrevocable ordinance, disclaim all right and title to public lands within the territory, and expressly recognized the exclusive right of congress to dispose of the same. That congress has such exclusive right has been expressly decided. (*Wilcox* v. *Jackson*, 13 Peters, *517.)

(2) The case comes down to this: Congress undertook to save certain land owned by the United States from unlicensed intrusions by live stock. It did this for two reasons, viz, (*a*) to protect the timber, and (*b*) to avoid such interferences with the rights of licensed users as would tend to destroy all attempts to regulate this use. In addition let it be conceded that there was a third, though secondary and incidental, motive, namely, to secure some reasonable pecuniary return for the grazing privilege, to help meet the expense of forest administration. Accordingly it forbade all persons to allow their animals to go or remain upon this land.

Now, waiving for the present the query whether the appellant is right in saying that this reservation was not an instrumentality of the Government, the case presents this single query: Under the Constitution is the United States, in protecting and in controlling the occupation and use of the public lands, subject to be governed by State regulations, as an individual property owner would be?

(*a*) Such control can not be exerted by denial of remedies, upon the hypothesis that the Government

is in any sense dependent upon State laws for the enforcement of its rights. The United States, to be sure, enjoys all the rights and remedies under the laws of the State that an individual would have. (*United States* v. *Gear*, 3 How., 120; *Cotton* v. *United States*, 11 How., 228, 231; *Camfield* v. *United States*, 167 U. S., 518.)

But when these fail it may provide its own remedies and enforce them in its own courts. Once concede the *right* of exclusive control and the power of enforcing it judicially is found in the Federal courts without any reference whatever to State laws regarding remedies. To deny this entails the absurdity of supposing that the Nation, whose rights, whatever they are and wherever they exist, are supreme, may have a right which it can not enjoy because the State fails or refuses to provide a remedy for its enforcement.

> Every government intrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. (*In re Debs*, 158 U. S., 564, 584.)

> The United States can declare by Congress what the law shall be with respect to the public lands, and enforce that law through the judiciary department. (*Irvine* v. *Marshall*, 20 How., 558.)
>
> Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving any national court jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts, and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced if at all in the State tribunals." (Story, Const., sec. 1674; *United States* v. *Texas*, 143 U. S. 621, 641.)

(*b*) Viewed as imposing a rule of conduct upon persons for the regulation of their respective rights, the law, with equal certainty, could not affect the Government. The State may not say to the Government that it shall not enjoy a right of property because it has not been diligent in adopting precautions prescribed by the State, nor absolve any individual from his duty to obey the Federal laws. The relations of the Government to individuals are governed by the National Constitution and the will of Congress, express or implied.

> The Government of the Union, then, * * * is, emphatically, and truly, a Government of

> the people. In form and in substance it emanates from them. Its powers are granted by them and are to be exercised directly on them, and for their benefit. (*McCulloch* v. *Maryland*, 4 Wheat., 316, 404.)

If an act of Congress declaring the duties of private persons in respect of Federal property be invalid, it must be because that act offends the Constitution, and it can not be declared unconstitutional because in conflict with a law of the State upon the hypothesis that a "police power" exists in the latter directly or indirectly to control the conduct of the Government or regulate its relations with individuals. The contrary argument in the opposing brief appears to be founded upon a misconception of the police power, assuming as it does that that power may rise superior to powers conferred upon the General Government by the Constitution.

(*c*) Whatever the real nature and the limits of the appellant's theory may be, it is clear that its adoption here can only mean that, in the use and control of its lands, in which the State, concededly, has no property interest whatever, the United States is subject to a very serious degree to be dominated by the changing, and it may well be capricious, policies of the State legislature. For instance, this particular law, the result of which, according to appellant, is to strip Congress of the power to prohibit the intrusions of live stock upon public land, might at any time be altered by the legislature in such terms as to confer upon the United States, in common with

private owners, the right of exclusive possession in the full sense. In that event Congress, desirous of enforcing the right, would be constitutionally justified in prohibiting such intrusions by holding the stock owner both civilly and criminally liable should they occur. Such an act, however, would stand not upon the firm foundation of the Constitution, but upon the quicksand of State permission; for the legislature might again change its policy and reenact the present law, thus nullifying the will of Congress and subtracting important provisions from its civil and criminal codes.

This theory of appellant is at war with the very nature of our Government. Ownership by private persons is subject, within constitutional limits, to the laws of the State where the property is situate. But national ownership could not be ruled by those laws without ignoring the cardinal principle that national supremacy is the inseparable attendant of every national subject. Since the lands are the property of the United States, the power to protect them and control their use must be admitted to be in the United States, simply because it could not be elsewhere and because the total absence of such a power would be contradictory of the very idea of ownership.

But the Constitution confers the power expressly. Article IV, Section III, clause 2, provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting ~~concerning~~ the territory or other property of the United States.

This applies to all property of the United States, whether real or personal.

> The power is not confined to the territory of the United States, but extends to "other property belonging to the United States"; so that it may be applied to the due regulation of all other personal and real property rightfully belonging to the United States. And so it has been constantly understood and acted upon. (*2 Story on Constitution*, par. 1325–end.)
>
> The term "territory" as here used is merely descriptive of one kind of property, and is equivalent to the word "lands." And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limitation. (*United States* v. *Gratiot*, 14 Pet., 526, 537, affirming Fed. Cas. No. 15249; 1 McLean, 454.)

This court has declared repeatedly that the power of Congress under this clause, being given without limitation, is absolute and exclusive of all State interference, and many other courts, both State and Federal, have reiterated the principle.

> *Wilcox* v. *Jackson*, 13 Pet. (1839), 498, 517.
> *United States* v. *Gratiot*, 14 Pet. (1840), 526.
> *Jourdan* v. *Barrett*, 4 How. (1846), 168, 184.
> *Irvine* v. *Marshall*, 20 How. (1857), 558.
> *Gibson* v. *Chouteau*, 13 Wall., 92, 99.
> *McCarthy* v. *Mann*, 19 Wall., 20.
> *Van Brocklin* v. *Tennessee*, 117 U. S., 151, 167.

United States v. *Insley*, 130 U. S., 263.
Redfield v. *Parks*, 132 U. S., 239.
Camfield v. *United States*, 167 U. S., 518, 525.
Shively v. *Bowlby*, 152 U. S., 1, 50, 52.
Mann v. *Tacoma Land Co.*, 153 U. S., 273, 283.
United States v. *Rio Grande Dam & Irrigation Co.*, 174 U. S., 690, 703.
Gutierres v. *Land & Irrigation Co.*, 188 U. S., 545, 555.
Kansas v. *Colorado*, 206 U. S., 46, 89.

Wilcox v. *Jackson* (13 Pet., 498) was a suit in ejectment in a State court of Illinois to recover possession of certain premises, constituting part of a military post, from the military commander, the plaintiff claiming under a preemption entry. This court held that the lands were reserved by law from acquisition under the preemption law, and that consequently the entry was void. Plaintiff nevertheless claimed a right of recovery by virtue of a law of the State which declared that a register's certificate should be deemed evidence of title sufficient to recover possession of the lands described therein in any action of ejectment. This court, in overruling the contention and reversing the judgment of the supreme court of the State upholding it, said (p. 516):

> It has been said that the State of Illinois has a right to declare, by law, that a title derived from the United States, which, by their laws, is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and

the construction of her own courts seems to give that effect to her statute. That State has an undoubted right to legislate as she may please, in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens, by descent, devise, or alienation. But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore by the laws of the United States the legal title has not passed, but remains in the United States. Now, if it were competent for a State legislature to say that, notwithstanding this, the title shall be deemed to have passed; the effect of this would be, not that Congress had the power of disposing of the public land, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only. And the practical result in this very case would be, by force of State legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this, that whenever the question in any court, State or Federal, is,

> whether a title to land which had once been the property of the United States had passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to the State legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

In *United States* v. *Gratiot* (14 Pet., 526) there was an action upon a bond given for the faithful performance of a contract entered into under authority of the President and amounting in law to a lease of certain lead mines on public lands. The lease was made pursuant to an act of Congress of March 3, 1807, which, among other things, declared:

> That the several lead mines in the Indiana Territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States—

And that the President was authorized to lease any lead mines in said Territory for a term not exceeding five years. The court upheld this legislation, saying (p. 536):

> That the mines now in question lie within the territory referred to in the act of Congress and are the property of the United States is not denied. And the Constitution of the United

States (Art. IV, sec. 3) provides, "that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation and has been considered the foundation upon which the Territorial governments rest. In the case of *McCulloch* v. *State of Maryland* (4 Wheat., 422) the Chief Justice, in giving the opinion of the court, speaking of this article, and the powers of Congress growing out of it, applies it to Territorial governments; and says, all admit their constitutionality. And again, in the case of the *American Insurance Company* v. *Canter* (1 Pet., 542), in speaking of the cession of Florida, under the treaty with Spain, he says that Florida, until she shall become a State, continues to be a Territory of the United States Government, by that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of Congress over the lands belonging to the United States, the words "dispose of" can not receive the construction contended for at the bar; that they vest in Congress the power only to sell and not to lease such lands. The disposal must be left to the discretion of Congress. And

> there can be no apprehension of any encroachments upon State rights by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument.

In *Jourdan* v. *Barrett* (4 How., 168) it was ruled that persons who entered upon lands of the United States without its consent were trespassers and could not successfully defend as against its grantees by invoking the State laws of prescription and limitation. The court said (p. 184):

> By the Constitution, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States;" for the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; so Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no State law, whether of limitation or otherwise, can defeat such title.

In *Irvine* v. *Marshall* (20 How., 558) it was held that one who, at a sale of public lands in a Territory, purchased in his own name as agent for another, must account as trustee to his employer, although the statutes of the Territory (Minnesota) had abolished all resulting trusts. The court said (p. 561):

> It can not be denied that all the lands in the Territories, not appropriated by compe-

> tent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new States, and has heretofore been recognized and scrupulously respected by sovereign States within which large portions of the public lands have been comprised, and within which much of those lands is still remaining.

Again (p. 563):

> It is asked under what head of jurisdiction, in the absence of express and contrary provision, the courts of the United States can recognize or enforce a resulting trust like that in the present case. The fallacy of the conclusion attempted from the first of the positions just stated consists in the supposition that the control of the United States over property admitted to be their own is dependent upon locality, as to the point within the limits of a State or Territory within which that property may be situated. But as the control, enjoyment, or disposal of that property must be exclusively in the United States, anywhere and everywhere within their own limits and within the powers delegated by the Constitution, no State, and much less can a Territory (yet remaining under the authority of the Federal Government), interfere with the

regular, the just, and necessary powers of the latter. Another error, inherent in the same position, is seen in the supposition that the contracts of the Government with respect to subjects within its constitutional competency are also local, confined in their effect and operation strictly to the *situs* of the subjects to which they relate. The true principle applicable to the objection just noted, and by which that objection is at once obviated, we hold to be this: That within the provisions prescribed by the Constitution and by the laws enacted in accordance with the Constitution, the acts and powers of the Government are to be interpreted and applied so as to create and maintain a *system*, general, equal, and beneficial as a whole. By this rule the acts and the contracts of the Government must be understood as referring to and sustaining the rights and interests of all the members of this confederacy, and as neither emanating from, nor intended for the promotion of, any policy peculiarly local, nor in any respect dependent upon such policy. The system adopted for the disposition of the public lands embraces the interests of all the States, and proposes the equal participation therein of all the people of all the States. This system is therefore peculiarly and exclusively the exercise of a Federal power. The theater of its accomplishment is the seat of the Federal Government. The mode of that accomplishment, the evidences or muniments of right it bestows, are all the work of Federal functionaries alone. Are these things in any degree compatible with the

> claim to prescribe to the United States the modes or the extent in which they may dispose of their own property, or with a denunciation of a forfeiture as the consequence of a departure from such a pretension?

In *Gibson* v. *Chouteau* (13 Wall., 92) it was held that occupation of lands derived from the United States, before the issue of its patent, for the period prescribed by the State statutes of limitation for commencement of actions to recover real property, could not operate to bar an action of ejectment founded upon the legal title subsequently conveyed by the Government. This court, speaking through Mr. Justice Field, laid down the law as follows (p. 99):

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the

> further clause that the legislature shall also not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the *bona fide* purchasers."
>
> The same principle which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.

In *Van Brocklin* v. *State of Tennessee* (117 U. S., 151) it was decided that land within the State which, pursuant to acts of Congress for laying and collecting direct taxes, was sold, struck off, and purchased by the United States for the amount of the tax thereon, and was afterwards sold by the United States for a larger sum, or redeemed by the former owner, was to be considered as entirely exempt from State taxation during the period of Federal ownership, and for nonpayment of taxes assessed by the State during that time, could not be sold afterwards.

The court said at page 167 of the very learned and exhaustive opinion:

> Upon the admission of a State into the Union, the State doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdic-

tion to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the State and not in the United States. (*New Orleans* v. *United States*, 10 How., 662, 737; *Pollard* v. *Hagan*, 3 How., 212; *Goodtitle* v. *Kibbe*, 9 How., 471; *Doe* v. *Beebe*, 13 How., 25; *Barney* v. *Keokuk*, 94 U. S., 324.) But public and unoccupied lands to which the United States have acquired title, either by deeds of cession from other States or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise. (*United States* v. *Gratiot*, 14 Pet., 526; *Pollard* v. *Hagan*, 3 How., 212; *Irvine* v. *Marshall*, 20 How., 558, 563; *Gibson* v. *Chouteau*, above cited.)

In *Camfield* v. *United States* (167 U. S., 518) the court upheld the constitutionality of the act of February 25, 1885 (23 Stat., 321), which forbids inclosures of the public domain and provides for their summary abatement and for the criminal punishment of those who erect or maintain them. The lands in question were entirely within the State of Colorado. The court observed that the Government with respect to its own lands had the rights

(meaning *all* the rights) of an ordinary proprietor to maintain its possession and prosecute trespasses; might deal with such lands precisely as a private individual might deal with his farming property; might sell or withhold them from sale, or grant them in aid of railways or other public enterprises, etc., but would be "recreant to its duties as trustee for the people of the United States" if it permitted their monopolization for private gain. It viewed (p. 524) the act as intended to reach an evil which the ordinary rights of proprietors under the State laws could not reach, namely, inclosures resulting from fences erected wholly upon lands in private ownership, and in this connection it said (p. 525):

> The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State which it would have within a Territory, we do not think the admission

> of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation.

In *United States* v. *Cleveland & Colorado Cattle Company* (33 Fed., 323), which involved the right of the Government to invoke the injunctive power of the Circuit Court for the abatement of an unlawful inclosure independently of the statute construed in the *Camfield* case, Judge Brewer, upholding the power, observed (p. 330):

> Must the Government, finding parties in possession of the public domain, even though under a claim and color of title, proceed to an action at law to establish its title before restraining such parties from improper use of such land? The Government has not simply the rights of a property owner in respect to its lands; it has all the powers of sovereignty.

In *United States* v. *Rio Grande Dam & Irrigation Company* (174 U. S., 690) the court said (p. 703):

> Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State can not by its legislation de-

stroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

And in *Gutierres* v. *Albuquerque Land Company* (188 U. S., 545) the court said (p. 554):

> Of course, as held by the *Rio Grande* case (p. 703), even a State, as respects streams within its borders in the absence of specific authority from Congress, "can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the Government property."

In *Kansas* v. *Colorado* (206 U. S., 46, 86) the above excerpt from the *Rio Grande* case was again quoted with approval, and the court said, referring to the constitutional provision which we are now discussing (p. 89):

> The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of *control over its property*. This is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from

> the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to *authority over the property* belonging to the United States within their limits.

The case of *Shannon* v. *United States* (160 Fed., 870) is of especial interest because of its similarity with the case at bar. The Circuit Court of Appeals for the Ninth Circuit upheld a decree perpetually enjoining Shannon from permitting any of his stock to go or remain within a forest reservation in Montana, notwithstanding his reliance upon the State fence law. All of the contentions made by appellant in this case, and others which he does not make, such as the reasonableness of the Secretary's regulations and their authorization by Congress, are expressly met and disposed of. After reviewing a number of the authorities cited above, the court said (p. 875):

> In the light of these decisions, it is clear that the State of Montana had no dominion over the public lands lying within its borders, and no power to enact legislation directly or indirectly affecting the same. It could not give to the people of that State the right to pasture cattle upon the public domain, or in any way to use the same. Its own laws in regard to fencing and pasturing cattle at large must be

held to apply only to land subject to its own dominion. No one within the State can claim any right in the public land by virtue of such a statute. The United States have the unlimited right to control the occupation of the public lands, and no obligation to fence those lands, or to join with others in fencing them for the purpose of protecting its rights can be imposed on it by a State. The rights given by the State statutes to the subjects of the State extend only to the lands of the State. They end at the borders of the Government lands. At that border the laws of the United States intervene, and it is within their province to forbid trespass. Such laws being within the power of Congress, it is not necessary to discuss the question whether it is sovereign power or police power, or what may be its nature, for there is no power vested in the State which can embarrass or interfere with its exercise.

Numerous decisions of other courts are to the same effect. Some of them are:

United States v. *Gratiot*, 1 McLean, 454; 26 Fed. Cas., 15, 249.

Turner v. *Am. Baptist Union* (1852), 5 McLean, 344; 24 Fed. Cas., 14, 251.

Seymour v. *Sanders*, 3 Dillon, 437; 21 Fed. Cas., 12, 690.

Union Mill & M. Co. v. *Ferris*, 2 Sawyer 176.

United States v. *Cleveland, &c., Cattle Co.* 33 Fed., 323, 330.

Carroll v. *Price*, 81 Fed., 137.

Heckman v. *Sutter*, 119 Fed., 83; 128 id., 393.

Shannon v. *U. S.* (C. C. A.), 160 Fed., 870.
People v. *Folsom*, 5 Cal., 373, 378.
Doran v. *Central Pacific* (1864), 24 Cal., 246, 257.
Miller v. *Little*, 47 Cal., 348, 350.
Vansickle v. *Haines*, 7 Nev., 249, 262.
Fee v. *Brown*, 17 Colo., 510, 519 (affirmed in 162 U. S., 602).
Waters v. *Bush*, 42 Iowa, 255.
David v. *Rackabaugh*, 32 id., 540.
Sorrels v. *Self*, 43 Ark., 451, 452.

(3) The argument that the power to "dispose of" public lands is no more than a power to grant them away, and does not contemplate the retention of the title and the reservation of the lands for national uses, besides being an argument which the appellant has no standing to make, is clearly opposed by the broad principle of construction which obtains as to all powers granted without limitation, and which this court has applied in the decisions above quoted. The real object of the clause was to make plain beyond a doubt that in respect of all the Federal property Congress, to quote the words of the Supreme Court of Colorado (*Fee* v. *Brown*, 17 Colo., 510, 519), "is omnipotent." "The disposal must be left to the discretion of Congress" (*Wilcox* v. *Jackson*, *supra*).

The following observations are, however, pertinent:

(*a*) The argument overlooks the primary meaning of the words "dispose of":

> To dispose of: (*a*) To determine the fate of; to exercise the power of control over;

> to fix the condition, application, employment, etc., of; to direct or assign to a use. (*b*) To exercise finally one's power to control over; to pass over into the control of some one else, as by selling; to alienate; to part with; to relinquish; to get rid of, as to *dispose of* a house; to *dispose of* one's time. (Webster's International Dictionary.)

(*b*) The property which Congress may "dispose of" comprises every species of property which the United States may own. If the power of disposition be confined to the single one of alienation as regards the public lands, it must be similarly restricted as to all other property, personal as well as real.

(*c*) The clause gives in general terms the power to make *all* needful rules and regulations respecting ~~concerning~~ the property of the United States. If this be taken generally, it certainly authorizes a regulation of the use of any property which the Government has, and thus supplies, for the purposes of this case at least, all that would be lost by an acceptance of the narrow interpretation of the words "dispose of."

(*d*) If the provision for rules and regulations were also construed as relating only to the subject of alienation, the entire clause would be robbed of its chief significance in the Constitution. No reason presents itself why the Constitution should take pains to declare the power of alienation—which certainly would be presumed from the power to acquire and hold—and leave entirely to implication the much more important powers of protection, enjoyment and use.

(4) The "disposition" and the "regulations" in this case, so far as they concern the appellant, stand well within the power of Congress, as already declared by this court in specific instances.

(*a*) The power to lease mines was upheld in *United States* v. *Gratiot* (14 Pet., 526). Then why not the power to lease lands, or license their use, for pasturage? Timber may be "disposed of" to individuals without the land. (20 Stat., 88; 26 Stat., 1093; *Northern Pacific* v. *Lewis*, 162 U. S., 366; *United States* v. *United Verde Copper Co.*, 196 U. S., 207.) And why may not Congress adopt a general plan, such as is found in the forest reserve legislation, which looks to the protection as well as to the conservative disposition of timber as the main thing and pasturage incidentally?

(*b*) Again, the regulations of which appellant complains were for the protection of the trees as well as of the use. The bill alleges (rec., 2) and the answer admits (rec., 12) a finding by the Secretary of Agriculture that excessive grazing is detrimental "to the proper protection and perpetuation of the forests." Appellant is in no position to dispute the conclusive force of this finding. (*Bates* v. *Payne*, 194 U. S., 106.) As a purely protective measure Congress was authorized not only to prohibit, as it did, such injurious intrusions, but also to visit criminal punishment upon all persons responsible for them. (Act of February 25, 1885; *Camfield* v. *United States*, 167 U. S., at p. 525; R. S., sec. 2461; 20 Stat., 90, sec. 4; *United*

States v. *Briggs*, 9 How., 351; *Shiver* v. *United States*, 159 U. S., 491.)

> The Government has not simply the right of a property owner in respect to these lands. It has all the powers of sovereignty. (Mr. Justice Brewer in *United States* v. *Cleveland, etc., Cattle Co., 33 Fed., 33.*)

(5) It remains to refer briefly to certain decisions much relied on in the opposing brief.

Pollard's Lessee v. *Hagan et al.*, decided in 1845 (3 How., 212), was ejectment concerning land in Alabama on the Mobile River, a tidal stream. Plaintiffs claimed under a patent of the United States issued pursuant to the act of July 2, 1836 (6 Stat., 680; the opinion, p. 219, cites the act as of July 6), which undertook to confirm to the heirs of Pollard a certain lot by description, and directed the issuance of a patent in the usual form, but contained a proviso that the act should operate merely as a relinquishment upon the part of the United States of whatever claim or right it might have in the premises, and without prejudice to the claims of third persons. Plaintiffs also cited, and claimed under, the act of May 26, 1824 (4 Stat., 66), granting certain lots to the city of Mobile and to certain individuals claiming them under acts of Spain. (Pollard's title is fully explained in *Pollard* v. *Kibbe*, 14 Pet., 353.) The defendants, besides asserting a claim of their own, maintained that, as the land lay below high-water mark, no grant of the title could be given by the United States *after* the admission of Alabama as a State (1819). It was upon this propo-

sition, adopted in the charge to the jury, that the decision turned. The majority opinion, written by Mr. Justice McKinley, contains a number of general statements which have since been relied on, as they are here, by those who would deny the right of the Government to control the public lands. As the case has been limited and in part at least disapproved by the court itself on a number of occasions, it may not be improper to suggest that these general statements are *dicta* which, so far as they affect the case at bar, have been found unacceptable in later decisions.

Thus the statement (p. 223) that the United States has no power of eminent domain was silently denied in *Kohl* v. *United States* (91 U. S., 367), where the contrary was decided. And in *Shively* v. *Bowlby* (152 U. S., 1, 26–28) the court was at special pains to point out that the decision really "involved only a grant made by Congress after the admission of Alabama" (p. 28), and to say that so much of the reasoning of Mr. Justice McKinley "as implied that the title to the land below high-water mark could not have been granted away by the United States after the deed of cession of the territory (by Georgia) and before the admission of the State into the Union, was not necessary to the decision." (Ibid.)

Withers v. *Buckley*, decided 1857 (20 How., 84), involved a question whether a law of Mississippi authorizing a canal to divert waters of a navigable tributary of the Mississippi was in conflict with a provision in the enabling act providing that the Mississippi River and its navigable tributaries should

be common highways and forever free to all citizens of the United States. As a matter of fact, the State law and this Federal provision were found to be in harmony.

Appellant also cites *People* v. *Shearer* (30 Cal., 645), as to which it is enough to quote from an opinion by this court:

> The Supreme Court of the State of California appears at one period to have assumed that the exemption of the lands of the United States from taxation depended upon the terms of the act of Congress admitting the State into the Union, or upon the statutes of the State. (*People* v. *Morrison*, 22 Cal., 73; *People* v. *Shearer*, 30 Cal., 645.) But in later cases it has taken broader ground, and has defined the meaning of "taxation" as "a charge levied by the sovereign power upon the property of its subject. It is not a charge upon its own property, nor upon property over which it has no dominion. This excludes the property of the State, whether lands, revenues, or other property, and the property of the United States." (*People* v. *McCreery*, 34 Cal., 342, 456; *People* v. *Austin*, 47 Cal., 353, 361; *Van Brocklin* v. *Tennessee*, 117 U. S., 165.)

In *United States* v. *Bridge Company* (6 McLean, 517) it was held that lands of the United States might be appropriated for roads and bridges under the eminent domain of a State, and in *United States* v. *Chicago* (7 How., 185) there were *dicta* to the same effect. Since, as is now clear, a State can not sue

the United States without its consent (*Kansas* v. *United States*, 204 U. S., 331), such a power of eminent domain if it existed would amount to a power to take arbitrarily without process of law.

In *Van Brocklin* v. *Tennessee* (117 U. S., 161) this court said, speaking first of the bridge company's case:

> The question in issue in that case was not of the State's right of taxation, but of its right of eminent domain for the construction of roads and bridges. The decision of the learned justice in favor of the validity of the exercise of that right by a State over lands of the United States, without the consent of the United States, manifested either by an express act of Congress or by the assent of a department or officer vested by law with the power of disposing of lands of the United States, appears to have been based upon the theory that the United States can hold land as a private proprietor for other than public objects, and upon a presumption of the acquiescence of Congress in the State's exercise of the power as tending to increase the value of the lands; and it finds some support in *dicta* of Mr. Justice Woodbury, in a case in which, however, the exercise of the power by the State was adjudged to be unlawful. (*United States* v. *Chicago*, 7 How., 185, 195.) But it can hardly be reconciled with the views expressed by Congress, in acts concerning particular railroads too numerous to be cited, as well as in general legislation.

(Acts of Aug. 4, 1852, ch. 80, and Mar. 3, 1855, ch. 200, 10 Stats., 28, 683; July 26, 1866, ch. 292, sec. 8, 14 Stat., 253; Rev. Stat., sec. 2477.) When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court.

As for those decisions in which the United States was referred to as an "ordinary proprietor," or as having only the rights of an "ordinary proprietor," respecting the public lands, it is enough to say, as examination of the opinions will amply demonstrate, that the expression was used as one of convenience in distinguishing the case where the national power depends on national ownership from the case where exclusive Federal jurisdiction exists over land as a *locus*.

Finally, the decision whereby the Nation is subjected in its rights or remedies to the control of State laws has yet to be made by this court. There are insuperable difficulties in the way of the appellant's hypothesis. What would be the limits to which the State might go? Would the Nation become a mere "person," compelled to flee to the cover of the fourteenth amendment to protect itself from a denial or confiscation of property rights? If not, upon what theory could it demand any protection at all except the one and obvious theory that it is a sovereign nation, supreme in its sphere; that the powers to acquire, hold, protect, and control property, among its necessary attributes, spring out of

and rest upon not the laws of another sovereignty, but the laws of its own being?

The case does not call for a listing of all the things which Congress may and all that it may not authorize on land owned by the United States. We are not required to argue in defense of extravagant conjectures concerning activities which the Government might attempt to promote, merely by virtue of land ownership.

> Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail. (*United States* v. *Lee*, 106 U. S., 196, 217.)

The conservation and uses contemplated by the forest policy are natural, reasonable, and beneficent to the people of the entire country. Lands so held and administered are among the inviolable "instrumentalities" of the Government. (*Van Brocklin* v. *Tennessee*, 117 U. S., 177.)

It is respectfully submitted that the appeal should be dismissed or the decree affirmed.

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APPENDIX.

Statutory provisions concerning national forests:

That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. (Act of Mar. 3, 1891; 26 Stat., 1103, sec. 24.)

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reser-

vations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction, and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

* * * * *

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes as may be needed by such persons for such purposes, such timber to be used within the State or Territory, respectively, where such reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property, under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

* * * * *

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. (Act of June 4, 1897; 30 Stat., 11, 34, 35, 36.)

The Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands. (Act of Feb. 1, 1905; 33 Stat., 628.)

All money received after July first, nineteen hundred and seven, by or on account of the Forest Service for timber, *or from any other source of forest reservation revenue*, shall be covered into the Treasury of the United States as a miscellaneous receipt, and there is hereby appropriated and made available as the Secretary of Agriculture may direct, out of any funds in the Treasury not otherwise appropriated, so much as may be necessary to make refunds to depositors of money heretofore or hereafter deposited by them to secure the purchase price on the sale of any products or *for the use of any land or resources* of the national forests in excess of amounts found actually due from them to the United States. (Act of Mar. 4, 1907; 34 Stat., 1256.)

That hereafter twenty-five per centum of all money received from each forest reserve during any fiscal year, including the year ending June thirtieth, nineteen hundred and eight, shall be paid at the end thereof by the Secretary of the Treasury *to the State* or Territory in which said reserve is situated, to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated: *Provided*, That when any forest reserve is in more than one State or Territory or county the distributive share to each from the proceeds of said reserve shall be proportional to its area therein. (Act of May 23, 1908; 35 Stat., 260.)

Regulations of the Secretary of Agriculture concerning live stock and grazing, approved June 3, 1907, from The Use Book for that year:

REG. 39. Whenever any live-stock association whose membership includes a majority of the owners of any class of live stock using a national forest or portion thereof shall appoint a committee, an agreement on the part of which shall be binding upon the association, such committee, upon application to the Forester, may be recognized as an advisory board for the association, and shall then be entitled to receive notice of proposed action and have an opportunity to be heard by the local forest officer in reference to increase or decrease in the number of stock to be allowed for any year, the division of the range between different classes of stock or their owners, or the adoption of special rules to meet local conditions.

REG. 40. The Secretary of Agriculture will prescribe each year the number of stock to be allowed in each national forest. The period during which grazing will be allowed will be determined by the Forester. The supervisor will issue grazing permits in accordance with the instructions of the Forester.

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REG. 41. National forests in which grazing is allowed will be divided into districts approved by the Forester, who will determine the kind of stock to be grazed in each district. The supervisor will make such range divisions among applicants for the grazing permits as appear most equitable and for the best interest of the national forest and its users. When required for the protection of camping places, lakes and streams, roads and trails, etc., or of areas which are to be reforested, the supervisor may exclude stock from specified areas for such period of time as is necessary. Stock will be excluded from areas where they will destroy young growth or will prevent reproduction.

REG. 42. All persons must secure permits before grazing any stock in a national forest, except for the few head in actual use by prospectors, campers, and travelers, or which are used in connection with business of the national forests, and milch or work animals not exceeding a total of ten head owned and in use by bona fide settlers residing in or near a national forest, which require no permit.

REG. 43. Permits will be granted only for the exclusive use and benefit of the owners of the stock and will be forfeited if sold or transferred in any manner or for any consideration. Speculation in the use of grazing permits will not be allowed, and permits will be refused or canceled for intentional false statement of the number of stock owned.

REG. 44. The supervisor will set and give public notice of a date each year on or before which all applications for grazing permits must be presented to him. Permits may be refused to persons who do not file their applications within the required limit, unless satisfactory reasons are given.

REG. 45. Grazing applications must not cover more stock than the applicant desires to graze in the national forest, and must show the marks and brands of the stock, the portion of the national forest or district in which pasture is desired, and the grazing period.

REG. 46. Whenever there is a dispute between grazing applicants for the same area, the supervisor will notify them to appear before him at a stated time and place, to make a statement of their claims. After all evidence has been presented the supervisor will decide who shall be granted permits, and will forthwith notify each party to the dispute of his decision and his reasons therefor, which will be final unless written notice of appeal to the Forester is given him within ten days thereafter. Appeal will avail only in case of error.

REG. 47. Persons owning cattle and horses which regularly graze on ranges located along the boundary line and only partially included within a national forest may be granted permits for such portion of their stock as the circumstances appear to justify, but may be required to herd or so handle their stock as to prevent trespassing by that portion for which a permit is not granted, and to sign a supplemental agreement to that effect.

REG. 48. A reasonable fee will be charged for grazing all classes of live stock on national forests. The minimum prices will be as follows, depending upon the advantages and locality of the forest: From twenty (20) to thirty-five (35) cents per head for cattle and horses for the summer grazing season, and from thirty-five (35) to sixty (60) cents per head for the entire year; from ten (10) to fifteen (15) cents per head for hogs for the summer grazing season, and from twenty (20) to thirty (30) cents per head for the entire year; from five (5) to eight (8) cents per head for sheep for the summer grazing season, and from ten (10) to eighteen (18) cents per head for the entire year; and from six (6) to ten (10) cents per head for goats for the summer season, and from twelve (12) to twenty (20) cents per head for the entire year. An extra charge of two (2) cents per head will be made for sheep or goats which are allowed to enter the national forests for the purpose of lambing or kidding. All stock six (6) months old and over at the time of entering will be counted as grown stock.

REG. 49. All grazing fees are payable for each year strictly in advance. When an applicant for a grazing permit is notified by the supervisor that his application has been approved, he will remit the amount due for grazing fees to the fiscal agent, Forest Service, Washington, D. C., and upon return of the certificate to the supervisor a permit will be issued allowing the stock to enter the forest and remain during the period specified.

No permit will be issued until payment in full has been made.

Persons who fail to pay the grazing fee thirty days before the beginning of the grazing period must notify the supervisor and give satisfactory reasons, or they may be denied a grazing permit the following season.

REG. 50. The fees paid on account of a grazing permit which has been duly issued will not be refunded for nonuse of the permit, except when, in the opinion of the Forester, the applicant is prevented from using the range by circumstances over which he has no control.

REG. 51. When an owner who has a permit is ready to drive in his stock he must notify the supervisor, by mail or otherwise, stating the number to be driven in; he must also notify the supervisor when the stock is removed. If called upon to do so, he must provide for having his stock counted before entering the national forest, or at any time afterwards when the number of stock appears to be greater than the number covered by permit. Whenever any stock is removed before the expiration of the permit, it can be replaced by other stock to fill out the number covered by permit if the nearest forest officer is notified of such action at once. The owners of stock which is kept under herd upon the national forests will be furnished with cards for the identification of their herders by forest officers.

REG. 52. Each person or group of persons granted grazing permits will be required to repair all damage to roads or trails caused by the presence of their

stock in any portion of a national forest, and to build any new roads or trails found necessary for the proper handling of the stock. They will also be required to fence any spring or seep which is being damaged by tramping, and, if necessary, pipe the water into troughs for watering stock. Such troughs must be open for public use.

REG. 53. Sheep must not be bedded more than six nights in succession in the same place, except when bedding bands of ewes during lambing season, and must not be bedded within three hundred yards of any running stream or living spring, except in rare cases where this restriction is clearly impracticable.

REG. 54. The carcasses of all animals which die in the close vicinity of any water must be removed immediately and buried or burned.

REG. 55. All stock grazed under permit must be salted regularly at such places as are designated by the forest officers, and the owners of stock must notify the forest officers when any such order has been complied with.

REG. 56. All persons holding grazing permits are required to extinguish camp fires started by them or their employees before leaving the vicinity thereof, and to aid in extinguishing all forest fires within the division or district of the national forest in which they are grazing stock.

REG. 57. Whenever an injury is being done the national forest by reason of improper handling of the stock, the owner must comply with the orders of the the forest officers or the permit will be canceled and the stock removed. The grazing of stock upon a closed area or upon range not allowed by the permit will constitute a trespass, and the owner of the stock will be held liable for damages.

REG. 58. Persons who own, or who have leased from the owners, land within any national forest which they desire to use for grazing purposes will be allowed to cross the forest lands with their stock to reach such private holdings, but when the stock will

be grazed on national forest land en route, they must make application to the supervisor for a permit to cross. The application must be accompanied by a personal certificate of title showing the description and ownership of the land, and, if leased from an owner, a copy of the lease, and must state the number of stock to be taken in, the length of time required to cross the national forest land, the route over which the stock is to be driven, the period during which the stock will remain upon the private land, and how much stock the owned or leased land will pasture during the period specified.

When the private land is unfenced a special clause may be inserted in the agreement waiving the right to the exclusive use of the private land and allowing it to remain open to other stock grazed under permit, in consideration of which a permit will be issued free of charge allowing the stock to be grazed at large upon the national forest, but the grazing fee must be paid on all stock over the estimated grazing capacity of the private lands.

When any such application is made to the supervisor he will examine it, and if he finds it reasonable and just and made in good faith for the purpose of utilizing such private holdings only, he will approve it and forward it, accompanied by all papers supporting it, to the Forester. After the Forester approves the application, due notice will be given the supervisor, who may then issue a permit allowing the stock to enter.

REG. 59. Persons wishing to drive stock across any part of a national forest must make application to the supervisor or other forest officers, either by letter or on the regular grazing-application form, for a permit to graze stock en route, and must have a permit from the supervisor, or such other forest officer as he may designate, before entering the national forest. The application must state the number of stock to be driven, the date of starting, and period required for passage. Grazing must be confined to the limits and along the route designated by the forest officers, and

will only be allowed for the period actually necessary for stock to cross the national forest.

Permits will not be required for driving small bands of stock along public highways, or when the stock will not be grazed upon national-forest lands en route.

REG. 60. All stock which is grazed under permit in or allowed to cross any national forest will be required to conform to the quarantine regulations of the Bureau of Animal Industry, U. S. Department of Agriculture, and all live-stock laws of the State or Territory in which the national forest is located.

REG. 61. The construction and maintenance of drift or division fences will be allowed when they will be a benefit to the national forest or its administration and will not interfere with the use of the range by all who are equitably entitled to share in the grazing.

REG. 62. The construction of corrals upon national forest lands covering an area of not more than one (1) acre, to be used in connection with the proper handling of live stock which is permitted to graze thereon, will be allowed without charge wherever in the judgment of the forest officers such corrals are necessary and will not be detrimental to the proper care of the forest. The construction of inclosures upon national forest lands containing not more than three hundred and twenty (320) acres will be allowed, when such inclosures are necessary for the proper handling of the stock allowed to graze upon the forests, under a special permit, for which an annual rental of not less than four (4) cents per acre will be charged in addition to the regular grazing fee. The fencing up of watering places for the purpose of controlling adjoining range will not be allowed, and in fencing pastures provision must be made to allow free access to water by any stock grazing under permit. The application must be made on Form 832 in the same manner as for other special uses.

REG. 63. All forest officers will cooperate with State or Territorial officials, so far as they can without undue interference with their regular forest work,

to enforce local laws for the protection of game and stock. When authorized to do so by the proper State officers, they will, without additional pay, except bounties and fees offered by associations and States, act as game wardens with full power to enforce the local laws. If not so authorized, they will promptly inform the State officials of all violations discovered.

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